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Kenneth Michael Theurer, Maj, USAF
Aug 2000
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Master of Laws (LL.M.) George Washington University Law School

Abstract: Today, when a defense contractor enters into a contract with the United States the cost of environmental cleanup is often considered part of the contract price. The contractor passes to the taxpayer the costs of complying with a myriad of environmental statutes and regulations. However, prior to the enactment of environmental legislation in the 1970's and 1980's, government contracts rarely addressed environmental issues or delineated the responsibilities of the parties. With the passage of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in 1980, many defense contractors were suddenly faced with enormous liability for the cleanup of long-forgotten sites dating back as far as World War II. Faced with limited success in seeking contributions from the federal government under CERCLA, imaginative contractors have sought other avenues of redress.

One such avenue is to bring suit against the United States based on a breach of contract theory. Several defense contractors have attempted to recover clean-up costs under a contract theory based on these indemnification clauses. The United States Supreme Court has lent support to such contractual theories in *United States v. Winstar*. Read in the broadest light, *Winstar* stands for the proposition that the government will be liable for damages if, as a result of a subsequent change in the law, the United States denies a contractor the benefit of an earlier bargain.

This thesis addresses ongoing problems with the cleanup of defense contractor sites required under CERCLA. Section I briefly deals with the different situation contractors of today and yesterday face when dealing with environmental issues. Section II details defense contractor and governmental liability under CERCLA § 107. Section III of the thesis focuses on contractors seeking damages from the United States under a breach of contract theory based on the enactment of CERCLA as a change in the law analogous to *Winstar*. The thesis analyzes the *Winstar* issue as applied to environmental issues by the Federal Circuit in *Yankee Atomic Electric Co. v. United States*. Even if these contracts should survive the *Winstar* analysis, this thesis describes additional impediments to recovery. This thesis concludes that governmental liability should depend on the nature of the risk allocation in the particular contract.

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Sharing the Burden: Allocating the Risk of CERCLA Cleanup Costs

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A Thesis submitted to
The Faculty of

The George Washington University
Law School
in partial satisfaction of the requirements
for the degree of Master of Laws

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INTRODUCTION

Today, when a defense contractor enters into a contract with the United States the cost of environmental cleanup is often considered part of the contract price.[1] The contractor passes to the taxpayer the costs of complying with a myriad of environmental statutes and regulations. However, prior to the enactment of environmental legislation in the 1970's and 1980's, government contracts rarely addressed environmental issues or delineated the responsibilities of the parties. With the passage of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in 1980, many defense contractors were suddenly faced with enormous liability for the cleanup of long-forgotten sites dating back as far as World War II.[2] Interested in sharing these unanticipated and prohibitive costs, the contractors sought contributions from the United States as an "owner," "operator" or "arranger" under CERCLA § 107.[3] The success of these contractors has varied

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[1] DCAA Contract Audit Manual, Vol. 1, 7-2120.2, Jan. 2000 ("Environmental costs are normal costs of doing business and are generally allowable costs if reasonable and allocable.... Environmental costs include costs to prevent environmental contamination, costs to clean up prior contamination, and costs directly associated with the first two categories including legal costs"); *See generally* Robert Burton, *DMMC Tackles High Profile Cost Issues*, 34-FALL PROCUREMENT Law 14, 15 (1998).

[2] CERCLA, 42 U.S.C. § 9601 *et seq.* (1995 & 1999 WESTLAW electronic update). As an example, in January 2000 the United States entered into a settlement agreement with Lockheed Martin to pay half of a $265 million cleanup effort already incurred and one-half of future cleanup costs at the "Skunk Works" facility located in Burbank, California. The plant was used by the United States government and the defense contractor for the production of numerous warplanes including the F-117 Stealth Fighter. Andrew Blankstein, *U.S. to Reimburse Lockheed in Toxic Cleanup Environment: Under settlement, government will pay firm more than $155 million for ground water, soil contamination in Burbank,* LOS ANGELES TIMES, Jan. 21, 2000, at B1.

[3] *See, e.g.,* FMC Corp. v. United States, 29 F.3d. 833 (3rd Cir. 1994)(government liable under an "actual control" theory for clean-up of a WWII defense contractor facility); East Bay Municipal Utility District v. United States, 142 F.3d 479 (D.C. Cir. 1998)(wartime mining operation was not sufficiently controlled by federal government to establish operator liability); United States v. Vertac Chemical Corp., 46 F.3d 803 (8th Cir. 1995)(government not liable as an operator for production of agent orange during Vietnam conflict at contractor plant); Maxus Energy Corp. v. United States, 898 F.Supp. 399 (N.D. Texas 1995)(government not liable under same reasoning as *United States v. Vertac*).

depending on a variety of factors including the Federal Circuit in which the action was brought. Faced with limited success in seeking contributions from the federal government under CERCLA, imaginative contractors have sought other avenues of redress.

One such avenue is to bring suit against the United States based on a breach of contract theory. Many defense contracts for war materials have included broad indemnity provisions.[4] Several defense contractors have attempted to recover clean-up costs under a contract theory based on these indemnification clauses. Only the Ninth Circuit has addressed the issue, yet they dismissed the claim on jurisdictional grounds without reaching the merits.[5] At least two cases are pending in the United States Court of Federal Claims.[6]

The United States Supreme Court may have lent support to such contractual theories in *United States v. Winstar*.[7] Read in the broadest light, *Winstar* stands for the proposition that the government will be liable for damages if, as a result of a subsequent change in the law, the United States denies a contractor the benefit of an earlier bargain.[8] With no clear majority, the Supreme Court's varying opinions and rationales do little to provide clear guidance in this area. The plurality decision discusses and intermixes the previous separate doctrines of "Unmistakability" and "Sovereign Acts"—and introduces the concept of "risk-sharing" as the primary arbiter of government liability.[9]

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[4] *See infra* notes 22-91 and accompanying text.

[5] Tucson Airport Authority v. General Dynamics Corp., 136 F.3d 641 (9th Cir. 1998).

[6] *See infra* notes 23-43 and accompanying text.

[7] 518 U.S. 839 (1996).

[8] *See infra* note 246-337 and accompanying text.

[9] *Id.*

The degree of uncertainty, introduced by *Winstar,* promises to produce litigation based on contracts already 50 years old for many more years to come.

This thesis will address ongoing problems with the cleanup of defense contractor sites required under CERCLA. Section I will briefly deal with the different situation contractors of today and yesterday face when dealing with environmental issues. Section II will detail defense contractor and governmental liability under CERCLA § 107. Section III of the thesis will focus on contractors seeking damages from the United States under a breach of contract theory based on the enactment of CERCLA as a change in the law analogous to *Winstar.* The thesis will analyze the *Winstar* issue as applied to environmental issues by the Federal Circuit in *Yankee Atomic Electric Co. v. United States.*[10] Even if these contracts should survive the *Winstar* analysis, this thesis will describe additional impediments to recovery. This thesis will conclude that governmental liability should depend on the nature of the risk allocation in the particular contract.

SECTION I: DEFENSE CONTRACTS—NOW AND THEN

Presently the nation is faced with the aftermath of years of defense spending that paid little heed to environmental consequences. Nationwide, the cost of cleaning up federal sites is estimated at $400 billion.[11] With such staggering costs, it is no surprise that defense contractors are seeking to share the costs with their contracting partner, the United States.

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[10] 112 F.3d 1569 (Fed. Cir. 1997). For a discussion, *see infra* notes 362-392 and accompanying text.

[11] *See* $400 Billion Toxic Cleanup Bill, WASH. POST, July 18, 1996, at A25. *See also* Randall J. Bunn, *Contractor Recovery for Current Environmental Cleanup Costs under World War II-Era Government Contract Indemnification Clauses,* 41 A.F. L. REV. 163 (1997). The cost of cleaning up federal facilities and federally controlled sites in Colorado alone is estimated at more than $12 billion. Burt Hubbard, *Toxic Cleanup Dwarfs DIA Cost Time Delays Adding To $12 Billion Price Tag To Be Paid By Taxpayers,* ROCKY MOUNTAIN NEWS, March 29, 1998, at 4A.

Today, defense contracts are required to consider environmental consequences throughout the procurement process. The same cannot be said of earlier defense contractor activities that continue to pose a threat to the environment. This section will briefly discuss environmental concerns as addressed in modern contracts. Second, the section will describe the provisions of older contracts and the resulting litigation. Finally, this section will discuss some of the inherent conflicts between the policies of environmental law and government procurement law.

Environmental Costs in Modern Defense Contracts

In the present day acquisition process, the Federal Acquisition Regulations [FAR] set forth the types of costs a contractor may pass on to the government during the performance of a contract.[12] In general, the contractor may include as overhead costs any charges that are both reasonable and allocable to the particular defense contract. "A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business." Allocable costs are those: (a) "incurred specifically for the contract; (b) [that] benefit both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received; or (c) [that are] necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown."[13]

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[12] Although there is no single statute governing acquisitions for all agencies, they have required a single regulation be promulgated. 41 U.S.C. § 405. The regulation, known as the Federal Acquisition Regulation (FAR) is codified at 48 C.F.R. Ch. 1. Individual agencies have supplemental regulation codified in various sections of 48 C.F.R. The Department of Defense Federal Acquisition Supplement (DFARS) is codified at 48 C.F.R. Ch. 2.

[13] FAR 31.201-2 (allowable costs are those which are reasonable and allocable).

Neither the FAR, nor DoD supplements to the FAR [DFARS], contain specific cost principles dealing with environmental costs.[14] Instead, environmental costs are dealt with on an individual basis within each contract. Environmental costs are ordinarily recognized as allowable costs provided they are both reasonable and allocable to the contract at hand.[15] These "costs include costs to prevent environmental contamination, costs to clean up prior contamination, and costs directly associated with the first two categories including legal costs."[16]

Additionally, modern defense acquisition policy requires consideration of environmental consequences throughout the procurement process.[17] Various environmental statutes, including the National Environmental Policy Act[18], Clean Air Act,[19] Clean Water Act[20], and Resource Conservation

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[14] *See* Burton, *supra* note 1, at 15.

[15] Defense Contract Audit Agency (DCAA) Contract Audit Manual, Vol. 1, 7-2120.2, Jan. 2000.

[16] *Id.*

[17] DoDD 5000.1, 4.1.12; Defense Acquisition; March 15 1996; (Incorporating Change 1, May 21, 1999)(" It is DoD policy to prevent, mitigate, or remediate environmental damage caused by acquisition programs. Prudent investments in pollution prevention can reduce life-cycle environmental costs and liability while improving environmental quality and program performance. In designing, manufacturing, testing, operating and disposing of systems, all forms of pollution shall be prevented or reduced at the source whenever feasible."). *See also* Hon. Jacques S. Gansler, Under Secretary of Defense (Acquisition and Technology), Address at the 24th Annual Environmental Symposium, Tampa, Florida (April 7, 1998).

[18] National Environmental Policy Act, 42 U.S.C. § 4432 (all federal policies, regulations, and public laws are required to be implemented in accordance with environmental policies set forth in the NEPA).

[19] 42 U.S.C. § 7606 (provides that contracts with violators of the CAA are prohibited and requires contracts entered into "must effectuate the purpose and policy" of the CAA).

[20] 33 U.S.C. § 1368 (prevents contracting with a person who has been convicted of violating the CWA at a facility where the violation occurred).

and Recovery Act,[21] contain provisions impacting the acquisition process. The FAR implements the mandates of these statutes. Unfortunately, environmental awareness is a relatively recent phenomenon, and was not considered in the formation of many Vietnam-era and earlier defense contracts.

Environmental Considerations — Defense Contracts Prior to and During the Vietnam Era

In the past decade, there have been a substantial number of defense contractors facing large cleanup costs resulting from defense efforts going back fifty or more years. None of these contracts contained specific contract language dealing with the allocation of future environmental costs. In addition, the regulations and policies in force at the time of these contracts were silent as to the risk allocation of the environmental consequences. However, a number of these contracts contained broad indemnification clauses. Today, these defense contractors point to these clauses as allocating the risk of future environmental cleanup costs to the United States. The United States, as well as many courts, takes a much narrower view as to the scope of the indemnification clauses.

World War II-Era Contracts

Many World War II era defense contracts contained indemnification clauses as part of their settlement agreements authorized under the Contract Settlements Act of 1944.[22] At least three of these contracts are the subject of ongoing or recent litigation within the federal courts.

Morgantown Ordnance Works

In late 1940, DuPont entered into a cost-plus-a-fixed-fee contract with the Department of the Army for the design, construction, and operation of the Morgantown Ordnance Works plant near

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[21] 42 U.S.C. § 6901 (RCRA requires that acquisitions set a preference for "recovered" materials instead of new).

[22] Contract Settlement Act of 1944, 41 U.S.C. § 101 *et seq.* (1994).

Morgantown, West Virginia.[23] The plant produced ammonia, methanol, formaldehyde, hexamine, ethylene urea, and heavy water.[24] These chemicals, produced under the contract, were used for the manufacture of weapons, including atomic bombs.[25]

The original contract included an indemnification clause whereby the government agreed:

> that all work [under this contract] is to be performed at the expense of the Government and that the Government shall hold the Contractor harmless against any loss, expense (including expense of litigation) or damage (including liability to third persons because of death, bodily injury or property injury or destruction or otherwise) of any kind whatsoever arising out of or in connection with the performance of work under this [contract].[26]

This indemnification clause was unconditional—provided that DuPont officials exercised due care and good faith in the operation of the plant.[27]

In August 1945, the parties entered into a supplemental contract, pursuant to the Contract Settlement Act, to address the termination of the original contract.[28] The supplemental contract contained a clause excepting from final release "[c]laims by the Contractor against the Government, which are based upon the responsibility of the Contractor to third parties and which involve costs reimbursable under the Contract, but which are not now known to the Contractor."[29]

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[23] Complaint, E.I. Du Pont De Nemours and Company v. United States, complaint filed, No. 99-101C (Fed. Cl., March 2, 1999) at 2 (hereinafter DuPont Complaint).

[24] *Id.* at 3.

[25] *Id.*

[26] Cost-Plus-A-Fixed-Fee, Design, Engineering, Construction, Equipment and Operation Contract, No. W-ORD-490, War Department (Nov. 28, 1940) at Article III(A)(8)(hereinafter DuPont Contract); DuPont Complaint, *supra* note 23, at 5.

[27] DuPont Complaint, *supra* note 23 at 5.

[28] *Id.*

[29] *Id.*

In January 1985, the EPA notified DuPont that it was a potentially responsible party [PRP] as defined under CERCLA § 107.[30] Subsequently, DuPont incurred considerable costs consistent with the National Contingency Plan (NCP).[31] On 25 August 1993, DuPont submitted a certified claim to the Contracting Officer under the Contract Disputes Act of 1978 for $485,248.79.[32] The parties negotiated back and forth while DuPont continued to incur cleanup expenses. In November 1998, DuPont submitted what it termed a "final certified updated claim" in the amount of $1,322,334.83, plus interest.[33] The Contracting Officer did not respond within 60 days and DuPont considered the absence of a response to be a denial of the claim.[34] In March 1999, DuPont filed suit against the United States in the United States Court of Federal Claims. The litigation is currently pending.

Willow Run

The United States Air Force is facing a similar claim brought by Ford Motor Company for the cleanup of the Willow Run site.[35] Today, that site, located in Ypsilanti, Michigan is contaminated with PCBs and other contaminants from its long use as an industrial complex and airport.[36] The

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[30] *Id.* at 8; The Morgantown Ordnance Works was added to the National Priorities List ("NPL") when the list was updated for the second time in 1984. 49 Fed. Reg. 40,320 (1984)(codified at 40 C.F.R. pt. 300).

[31] DuPont Complaint, *supra* note 23, at 9.

[32] *Id.* at 10.

[33] *Id.* at 14.

[34] *Id.* at 15.

[35] Complaint, Ford Motor Company v. United States, complaint filed, No. 98-186 (Fed. Cl., March 18, 1998) (hereafter Ford Complaint).

[36] The Willow Run site by agreement between the PRPs, the EPA and the state was not placed on the NPL. *Willow Run PCBs to be Contained On-site*, SUPERFUND WK., January 6, 1995, *available in* WESTLAW 1995 WL 7503998.

estimated cost of cleanup of the site is approximately $70 million.[37] During World War II, the United States assumed ownership of the facility and contracted with Ford Motor Company to produce B-24 "Liberator" bombers.[38]

The cost-plus-a-fixed-fee contract, in many ways similar to the DuPont contract discussed above, provided the following protections to Ford upon termination:

> b. Upon the termination of this contract as hereinbefore provided, full and complete settlement of all claims of the Contractor arising out of this contract shall be made as follows:
>
> 1. The Government shall *assume and become liable for all obligations, commitments and claims that the Contractor may have theretofore in good faith undertaken or incurred in connection with said work and in accordance with the provisions of this contract*; and the Contractor shall, as a condition to receiving the payments mentioned in this Article, execute and deliver all such papers and take all such steps as the Contracting Officer may require for the purpose of assuring to the Government, so far as possible, the rights and benefits of the Contractor under such obligations or commitments. [emphasis added]

The contract also contained provisions making rehabilitation of the plant an allowable cost.[39]

In March 1998, Ford Motor Company filed suit against the government in the United States Court of Federal Claims seeking reimbursement of its cleanup costs associated with the Willow Run site.[40] On April 20, 1999, Ford Motor Company, the Department of the Air Force, and other PRPs

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[37] *Willow Creek Begins PCB Dig*, SUPERFUND WK., August 29, 1997, *available in* WESTLAW 1997 WL 12955954.

[38] Contract No. W 535-ac-21216, Sept. 26, 1941, at 2 (on file with the Environmental Litigation Division, Air Force Legal Services Agency, Arlington, Va.)(hereinafter Ford Contract); For a detailed discussion of the Willow Run contract and the indemnification clauses, *see* Bunn, *supra* note 11. At the peak of production, the plant turned out a B-24 bomber every 59 minutes. WARREN B. KIDDER, WILLOW RUN: COLOSSUS OF AMERICAN INDUSTRY, HOME OF HENRY FORD'S B-24 "LIBERATOR" BOMBER 138, 189 (1995).

[39] Ford Contract, *supra* note 38.

[40] *See* Ford Complaint, *supra* note 35.

entered into a consent decree with the Environmental Protection Agency for the cleanup of the site.[41] The settling federal agencies agreed to pay $50,000 to the Superfund and an additional $450,000 to the other settling defendants.[42] In addition, Ford Motor Company reserved the right to continue seeking indemnification from the United States under the Willow Run contracts in the United States Court of Federal Claims.[43]

Tucson Airport Authority

Still another recent case involved a suit brought against the United States by General Dynamics based on a series of contracts from 1942-1944. These wartime contracts were for the modification of B-24 "Liberator" military aircraft in a three-hangar facility located at the Tucson Airport in Arizona.[44] The contracts were between the Army Air Forces and Consolidated Vultee Aircraft Corporation [Consolidated].[45] In 1944, at the conclusion of hostilities, the contracts were suspended and in 1945 the contracts were terminated.[46] The wartime contracts contained the following termination clause that was included in the settlement agreement at the conclusion of the war:

> (b) Upon termination of this contract as hereinbefore provided, full and complete settlement of all claims of the Contractor arising out of this contract shall be made as follows:
>
> (1) The Government shall assume and become liable for all

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[41] Consent Decree, United States v. Ford Motor Company, No. 98-71305, (E.D. Michigan, April 20, 1999), *available in* LEXIS 1999 EPA Consent LEXIS 83.

[42] *Id.* at 13.

[43] *Id.* at 21.

[44] Tucson Airport Authority v. General Dynamics Corporation, 922 F.Supp. 273, 277 (D. Ariz. 1996), *affirmed,* 136 F.3d 641 (9th Cir. 1998).

[45] *Id.*

[46] *Id.* at 278.

> obligations, commitments and claims that the Contractor may have theretofore in good faith undertaken or incurred in connection with said work and in accordance with the provisions of this contract, and the Contractor shall, as a condition to receiving the payments mentioned in this Article, execute and deliver all such papers and take all steps as the Contracting Officer may require for the purpose of fully vesting in the Government the rights and benefits of the Contractor under such obligations and commitments.
>
> . . . . .
>
> (c) Upon the making of said payments all obligations of the Government to make further payments or to carry out other undertakings hereunder shall cease forthwith and forever; ... except that all rights and obligations of the respective parties in respect of costs, expenses and liabilities which may thereafter be imposed on, or incurred by, the Contractor, without its fault or neglect, which are then undetermined or incapable of determination as to either existence, validity, or amount, shall remain in full force and effect (except to the extent that responsibility therefor may have been assumed by the Government under or pursuant to the provisions of subparagraph (1) of paragraph (b) of this Article).[47]

In the 1980s, state and federal authorities discovered contaminated groundwater in the area surrounding the Tucson Airport.[48] In 1988, after tracing the source of contamination to the hangar facility, the EPA notified General Dynamics, the successor in interest to Consolidated, that they might be a PRP.[49] In 1994, the Tucson Airport Authority brought an action against General Dynamics for the cost of investigation and remediation of the contaminated site.[50] General Dynamics filed a third-party claim against the United States.[51] The claim alleged the United States had assumed all liabilities

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[47] *Id;* Contract No. W 535-ac-26999, Oct. 5, 1942 (on file with the Environmental Litigation Division, Air Force Legal Services Agency, Arlington, Va.) (*hereinafter* Consolidated Contract).

[48] 922 F.Supp. at 278.

[49] *Id.*

[50] *Id.*

[51] *Id.*

arising under the contract and was obligated to assume General Dynamic's defense.[52] The Ninth Circuit, affirming the district court, ruled that the district court lacked jurisdiction to hear the contractually based claims and dismissed the third-party claim.[53] The court noted that the Court of Federal Claims was the appropriate venue.[54] In 1999, the United States and General Dynamics entered into a consent decree with the Environmental Protection Agency where the United States agreed to pay $35 million dollars for the cleanup under CERCLA § 107.[55] Neither the United States, nor General Dynamics waived any possible future contractual claims based on the wartime contracts in the United States Court of Federal Claims.[56]

Vietnam Era Contracts: Hercules and Vertac

Vietnam era contracts have also subjected defense contractors to unanticipated costs resulting from contamination years after contract performance. Contracts for the production of Agent Orange have resulted in both CERCLA cleanup costs and separate toxic tort lawsuits. In these cases, the contractors have sought recovery against the Government under contract theories. Without the specific indemnification provisions of the World War II era contracts, defense contractors have made imaginative arguments for implied indemnification.

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[52] *Id.* at 279.

[53] 136 F.3d at 647.

[54] *Id.* at 648.

[55] Consent Decree, United States v. Tucson Airport Authority, No. CIV-99-313-TUC-WDB, (D. Ariz., June 17, 1999), *available in* LEXIS 1999 EPA Consent LEXIS 124).

[56] *Id.* at 125-26.

Hercules—Agent Orange Litigation

During the 1960's, the United States entered a series of fixed-price production contracts for the production of phenoxyl herbicide, also known as Agent Orange.[57] The Department of Defense wanted the defoliant for use in the Vietnam Conflict to destroy enemy food supplies and hiding places.[58] The military entered into the contracts pursuant to the Defense Production Act of 1950.[59] The contracts ran from 1964-1968 when they were terminated.[60]

In the late 1970's, veterans and their families brought a series of lawsuits claiming health problems relating to dioxin, a byproduct contained in Agent Orange.[61] The suits were consolidated in a class action and hours before trial the defendants settled for $180 million.[62] Two of the defendants, Hercules Incorporated and Wm. T. Thompson Company [Thompson], brought suit against the United States in federal district court under tort theories of contribution and non-contractual

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[57] Hercules, Inc. v. United States, 516 U.S. 417, 419 (1996).

[58] *Id.*

[59] *Id.*; Defense Production Act of 1950 (DPA), 64 Stat. 798, *as amended,* 50 U.S.C. app. § 2061 *et seq.* (1988 ed. and Supp. V).

[60] 516 U.S. at 419.

[61] *Id.*

[62] The judge ruled that the viability of the "government contractor defense" could not be determined before a trial on the facts. *Id.* The plaintiff's who opted out of the class action subsequently list at trial based on "government contractor defense." *See* In re "Agent Orange" Product Liability Litigation, 818 F.2d 187, 189 (2nd Cir. 1987).

indemnification.[63] After losing, the companies brought suit in the United States Claims Court seeking recovery under the contract.[64]

The contracts did not contain specific indemnification provisions similar to the World War II contracts discussed above.[65] However, § 707 of the Defense Production Act [DPA] included the following provision:

> No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this Act ... notwithstanding that any such rule, regulation, or order shall thereafter be declared by judicial or other competent authority to be invalid.[66]

Thompson claimed relief based on an implied warranty of specifications and based on a theory of contractual indemnification.[67] The Claims Court dismissed the claims and the Federal Circuit affirmed the lower court.[68] On appeal, the United States Supreme Court addressed the companies' contractual claims in *Hercules, Inc. v. United States*.[69] The contractors argued that the Government by providing specifications warranted the contractor against the consequences of defects in the specifications.[70] The Court was unwilling to extend the *Spearin* doctrine beyond the government

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[63] 818 F.2d at 207.

[64] Hercules, Inc. v. United States, 25 Cl.Ct. 616 (1992); Wm. T. Thompson Co. v. United States, 26 Cl.Ct. 17 (1992).

[65] 516 U.S. at 424.

[66] DPA § 707, 50 U.S.C. app. § 2157 (1988 ed. and Supp. V).

[67] 516 U.S. at 421.

[68] *Id.*

[69] *Id.* at 422.

[70] *Id.* at 424.

warranty that the "contractor will be able to perform the contract satisfactorily if it follows the specifications."[71] The Court concluded that the implied warranty of specifications does not apply to third-party claims against a contractor.[72]

Additionally, the contractors alleged that under the circumstances the contract should be read to include an "implied agreement to protect the contractor and indemnify its losses."[73] Thompson did not argue that any express provision constituted a specific indemnification agreement.[74] Instead, the circumstances surrounding the contract created an implied indemnification agreement. The facts included that the "Government required Thompson to produce [Agent Orange] under authority of the DPA and threat of civil and criminal fines, imposed detailed specifications, had superior knowledge of the hazards, and, to a measurable extent, seized Thompson's processing facilities."[75] Additionally, Thompson argued § 707 of the DPA indicated a congressional intent to hold the contractor harmless for any liability flowing from compliance with the Act.[76] Finally, the contractor argued that simple fairness and equity should allow recovery.[77]

The Supreme Court was unwilling to find such an "implied indemnification agreement" for several reasons. First, the Court noted that it would be unlikely that a contracting officer would agree

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[71] *Id.* (quoting from United States v. Spearin, 248 U.S. 132, 136 (1918)).

[72] *Id.*

[73] *Id.* at 426.

[74] *Id.*

[75] *Id.*

[76] *Id.* at 429.

[77] *Id.* at 430.

to an open-ended indemnification clause that would clearly violate the law.[78] The Anti-Deficiency Act [ADA] prohibits federal employees from entering into a contract in excess of or before that money has been appropriated.[79] The Comptroller General had repeatedly ruled that such open ended agreements to indemnify contractors against third-party liability violate the ADA.[80] Second, at the time of the contract there was statutory authority to provide indemnification clauses in very particular and well-defined situations.[81] None of the statutory provisions for including an indemnification clause applied, and the contracting officer did not include such a provision. Third, the DPA § 707 provided a defense to liability, not an indemnification.[82] Finally, fairness and equity arguments are beyond the jurisdiction of the Court.[83] The Supreme Court, under these circumstances, was unwilling to find an implied indemnification clause.

Vertac—Agent Orange Contracts and CERCLA Cleanup

Another contract between Hercules and the United States for the production of Agent Orange resulted in a contractual dispute over Hercules' right to indemnification for CERCLA cleanup costs in *United States v. Vertac.*[84] *Vertac* involved a Vietnam era defense contract for production of Agent Orange.

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[78] *Id.* at 427-28.

[79] The Anti-Deficiency Act, 31 U.S.C. § 1341. *See infra* notes 428-436 and accompanying text.

[80] 516 U.S. at 427; In re Assumption of Liability of Contractor Liability to Third Persons—Reconsideration, 62 Comp. Gen. 361, 364-365 (1983).

[81] 516 U.S. at 428 (citing as an example, 50 U.S.C. § 1431 (1988 ed., Supp. V.)).

[82] *Id.* at 429-30.

[83] *Id.* at 430.

[84] 46 F.3d 803 (8th Cir. 1995). In 1964, Hercules, a chemical manufacturer in Jacksonville, Arkansas, won a competitive bid to supply the United States with the defoliant. During the period 1964-1968,

The defense contract at issue was a "rated contract" which, under the DPA, allowed the President to issue directives giving the contract priority over other contracts Hercules might have. Beginning in 1967, the United States directed Hercules to increase production—resulting in the entire facility being devoted to the production of Agent Orange. When Hercules was unable to meet production demands, the United States facilitated Hercules importation of chemicals.[85]

Hercules brought suit against the United States in district court citing two separate bases for recovery. First, the contractor argued the Government should be liable under CERCLA as an "operator" or "arranger."[86] The court rejected this argument as will be discussed in Section II of this thesis. Second, Hercules argued both immunity from liability and an implied right to indemnification from the United States.[87] The district court summarily rejected these arguments without discussion.[88] On appeal, the Eighth Circuit affirmed the lower court's decision with a brief discussion of the merits.[89]

According to Hercules, § 707 of the DPA, as cited above, provides a clear and unambiguous immunity from CERCLA liability arising from the contract. In addition, the contractor asserted that

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Hercules produced and supplied Agent Orange to the United States. During the contract, Hercules disposed of the waste associated with the production of Agent Orange. The United States was aware of the waste but not consulted concerning disposal. After the contract ended, Hercules produced other products using the same chemicals involved in the site's contamination. *Id.* at 806-07.

[85] *Id.* The contract also subjected Hercules to the Walsh-Healey Act—setting certain health and safety standards. The government conducted inspections pursuant to this act on two occasions. However, the government was not involved in personnel issues and did not own any of the equipment used in the plant. Hercules profited from the contract. *Id.*

[86] *See infra* notes 200—212 and accompanying text.

[87] 46 F.3d at 811.

[88] *Id.* at 812.

[89] *Id.*

Hercules' immunity granted under § 707, as well as, the United States' waiver of sovereign immunity and liability under CERCLA, create an implied-in-fact contractual obligation to indemnify.[90]

The Eighth Circuit was not persuaded, reasoning that § 707 must be read harmoniously with the rest of the statute. Section 101(a) of the statute sets out the purpose of the DPA, which was to give certain defense contracts priority over other contracts when necessary for national defense. Section 707 was designed to immunize contractors from possible liability arising from the priority system. The court held "the protection afforded by § 707 of the DPA extends no further than the risk imposed by § 101(a) of the DPA." Since the immunity argument failed, the indemnification argument likewise was without merit. The court found the United States never implicitly promised to indemnify the contractor against the type of liability asserted in this case.[91]

Contracting v. CERCLA Policies

As defense contractors, seek contributions from the United States, two policies inherent in different bodies of law clash.[92] In passing CERCLA, Congress wanted to ensure those "responsible for any damage, environmental harm, or injury from chemical poisons [are tagged with] the cost of their actions."[93] This responsibility is extended to the United States with broad waivers of sovereign immunity.[94] Procurement law, on the other hand, contains an obligation on the part of the United

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[90] *Id.*

[91] *Id.*

[92] Phillip M. Kannan, The Compensation Dimension of CERCLA: Recovering Unpaid Contract Costs, 30 U. MEM. L. REV. 29, 52 (1999).

[93] S. REP. NO. 96-848, pp. 6119, 13, U.S.Code Cong. & Admin.News 1980, p. 6119 (1980); United States v. Bestfoods, 524 U.S. 51, 56 (1998) (quoting passage with approval).

[94] The waiver of sovereign immunity under CERCLA provides:

States to protect the public fisc.[95] This results in courts narrowly construing contracts to limit contractor recovery. With no easy solution, defense contractors continue seeking recovery under various theories both under CERCLA and traditional contract theories.

SECTION II: DEFENSE CONTRACTOR CLAIMS UNDER CERCLA

When faced with the costly prospect of cleaning up a contaminated facility, defense contractors often turn to CERCLA to share the cost with other PRPs such as the United States. This section will examine the legislative history of CERCLA, as well as, theories of liability and contribution. Next, this section will discuss how CERCLA applies to actions against the United States as a PRP. Then, scenarios where defense contractors have sought contributions against the United States as an "owner," "operator," and "arranger" will be analyzed. The section will conclude with a discussion of equitable allocation of costs when the United States is found to be liable as a PRP.

Legislative History of CERCLA

> Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.

42 U.S.C. § 9620 (1986).

[95] *See generally* Universal Cranes, Inc. v. Stone, 975 F.2d 847 (Fed.Cir. 1992); United States v. Hatcher, 922 F.2d 1402, 1410 (9th Cir. 1991); City of El Centro v. United States, 922 F.2d 816, 824 (Fed.Cir. 1990)(dissent).

By the late 1970's, Congress had enacted major environmental legislation prohibiting the disposal of harmful pollutants into the water, the air, and onto land surface.[96] Nonetheless, each of these statutes was designed to prevent current and future pollution problems, and did little to address existing problems with toxic waste sites.[97] Startling revelations concerning the gravity and extent of toxic dumps within the nation highlighted the gap in the law and spurred Congress into action.[98]

Responding to public pressure, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act in 1980.[99] Unlike other major environmental legislation, CERCLA does not contain a provision specifically stating the purpose or the goals of the statute.[100] However, the legislative history accompanying the statute lends some insight into congressional intent. According to the Senate Report, the primary goal of CERCLA is to create a "Superfund" to allow for the immediate cleanup and restoration of contaminated sites. Just as important was provision of a

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[96] *See generally* Federal Water Pollution Control Act (CWA) 33 U.S.C. §§ 1251-1387; Clean Air Act (CAA) 42 U.S.C. §§ 7401-7671q; Resource Conservation and Recovery Act (RCRA) 42 U.S.C. §§ 6901-6992k; Safe Drinking Water Act, 42 U.S.C. §§ 300f – 300j-26 [Public Health Service Act]; Ocean Dumping Act, 33 U.S.C. §§ 1401-1445 [Marine Protection, Research, and Sanctuaries Act].

[97] S. REP NO. 96-848, at 10-12 (1980), *reprinted in*, Arnold & Porter Legislative History: P.L. 96-510.

[98] In 1977, a reporter for a small upstate New York newspaper wrote an article detailing a particularly disturbing account of the actions of a large chemical company. For years, Hooker Chemical had discarded barrels of chemical waste into the abandoned Love Canal near Niagara Falls, New York. After filling the canal with toxic waste, the company sold the land to the city to build an elementary school and playground. The surrounding land was developed into a housing area. Over the years, the barrels began to deteriorate causing subsiding and the leaching of the chemicals into the surrounding earth. Residents of the area developed severe health problems including liver problems, miscarriages, birth defects, sores, and rectal bleeding. In August 1978, President Carter declared the area a federal emergency. The school and homes in the area were boarded up, and residents were evacuated. *Id.* at 8-9.

[99] CERCLA, 42 U.S.C.A. §§ 9601 *et seq.* (1995 & 1999 WESTLAW electronic update).

[100] *See, e.g.,* CAA § 101, 42 U.S.C. § 7401 (1998); Federal Water Pollution Control Act (CWA) § 101, 33 U.S.C. § 1251 (1994); Solid Waste Disposal Act (RCRA) § 1002, 42 U.S.C. § 6901 (1996).

mechanism for holding liable those responsible for the waste.[101] In essence, the organizations that profit from the production of chemical wastes should be held responsible for cleanup efforts.

Congress implemented these objectives by creating a regime of strict, joint, and several liability on several classes of responsible parties—"owners," "operators," "arrangers," and "transporters."[102] The 1986 Amendments to the Act ameliorated the draconian impact of this strict, joint, and several liability by allowing responsible parties to seek contributions towards the cleanup costs from other responsible parties.[103] The courts are now permitted to distribute the cleanup costs among the responsible parties using principles of equity.[104]

CERCLA

Liability Under CERCLA § 107

CERCLA imposes strict liability, on four classes of persons, when there is a release or threatened release of a hazardous substance.[105] First, CERCLA imposes liability on the owner or operator of the applicable vessel or facility.[106] Second, any person who in the past owned or operated

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[101] S. REP NO. 96-848, at 12-13 (1980), *reprinted in*, Arnold & Porter Legislative History: P.L. 96-510.

[102] *Id.* While the statute does not specifically mention strict liability, courts have interpreted the statute in that manner. *See* FMC Corp. v. United States, 29 F.3d. at 835 ("liability for the costs incurred is strict").

[103] CERCLA § 113(f), 42 U.S.C.A. § 9613 (1995 & 1999 WESTLAW electronic update); *See also* Martin A. McCrory, *Who's on First: CERCLA Cost Recovery, Contribution, and Protection,* 37 AM. BUS. L.J. 3, 18-19 (1999).

[104] CERCLA § 113(f), 42 U.S.C.A. § 9613 (1995 & 1999 WESTLAW electronic update) ("In resolving contribution claims, the court may allocate response costs among liable parties using such equitable facts as the court determines are appropriate.")

[105] CERCLA § 107(a), 42 U.S.C.A. § 9607(a) (1995 & 1999 WESTLAW electronic update).

[106] CERCLA § 107(a)(1), 42 U.S.C.A. § 9607(a)(1) (1996) (1995 & 1999 WESTLAW electronic update). The term "facility" is broadly defined to include:

the applicable vessel or facility at the time the hazardous waste was disposed is also liable.[107] Third, persons who arrange for the transport, treatment, or disposal of hazardous substances are liable.[108] Finally, CERCLA imposes liability on a transporter who accepts hazardous wastes for transport to a site.[109]

Courts require plaintiffs to show four elements in order to recover costs under CERCLA § 107: (1) The site is a "facility" as defined in CERCLA § 101(9); (2) A "release" or "threatened release" of a "hazardous substance" from the site has occurred; (3) The release or threatened release has caused the United States to incur response costs; and (4) The defendants fall within at least one of the four classes of responsible persons described in CERCLA § 107(a).[110]

> (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

CERCLA § 101(9), 42 U.S.C.A. § 9601(9) (1995 & 1999 WESTLAW electronic update). The term "owner or operator" is tautologically defined as "any person owning or operating such facility." CERCLA § 101(20)(A), 42 U.S.C.A. § 9601(20)(A) (1995 & 1999 WESTLAW electronic update). The Supreme Court has expounded upon the definition of "operator" in *United States v. Bestfoods,* 524 U.S. 51, 66 (1998); *See infra,* notes 190-195 and accompanying text.

[107] CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2) (1995 & 1999 WESTLAW electronic update).

[108] CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3) (1995 & 1999 WESTLAW electronic update).

[109] CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4) (1995 & 1999 WESTLAW electronic update).

[110] United States v. Aceto Agric. Chem. Corp., 872 F.2d. 1373, 1379 (8th Cir. 1989); Envtl Trans. Sys., Inc. v. Emsco, Inc. 969 F.2d 503 (7th Cir. 1992); Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 668 (5th Cir.1989). The elements to be proved are not always consistent in various courts and are often fact-specific depending on the allegations of the plaintiff. *See, e.g., infra* text accompanying note 152.

Liable parties are responsible for various costs associated with the release of a hazardous substance. They are liable for "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan." Next, a responsible party may be liable to any other person for necessary response costs consistent with the NCP. Additionally, a responsible party is liable for damages to natural resources including costs of assessing those damages. Finally, responsible parties are liable for the costs of any health assessments or health effects studies conducted under CERCLA § 104(i).[111]

CERCLA § 107 recognizes three very narrow affirmative defenses to liability. The first two eliminate liability if the release of the toxic substance results from either an "act of God" or an "act of war".[112] An "act of God" is defined as "an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight."[113] Courts have interpreted this exception very narrowly.[114] While "acts of war" is not defined within the statute, courts have narrowly interpreted the definition to include only releases directly related to combat operations.[115] These two exceptions are so narrow as to have been virtually useless in limiting liability.

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[111] CERCLA § 107(a), 42 U.S.C. § 9607(a) (1995 & 1999 WESTLAW electronic update).

[112] CERCLA § 107(b), 42 U.S.C. § 9607(b)(1,2) (1995 & 1999 WESTLAW electronic update).

[113] CERCLA § 101(1), 42 U.S.C. § 9601(1) (1995 & 1999 WESTLAW electronic update).

[114] United States v. M/V Santa Clara, 887 F.Supp. 825, 843 (D.S.C. 1995)(a severe storm at sea did not qualify as an "act of God"); McCrory, *supra* note 103 at 15.

[115] *See* FMC Corp. v. United States, 786 F.Supp. 471 (E.D. Pa. 1992), *aff'd,* 10 F.3d 987 (1993), *vacted, reh. granted en banc,* 10 F.3d 987, *aff'd,* 29 F.3d 833 (3d Cir. 1994); United States v. Shell Oil Co., 841 F.Supp. 962, 972 (C.D. Ca. 1993). *See also* McCrory *supra* note 103, at 15.

The final defense, raised most often, is to blame the release on an "act or omission of a third party."[116] This defense is also limited in three very significant ways. First, the "act or omission" cannot occur in connection with a contractual relationship between the parties.[117] Second, the defendant must prove that he exercised due care with respect to the hazardous substance based on all the facts and circumstances.[118] Third, the defendant must show "he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions."[119] A defendant may raise any combination of these defenses.[120]

Contribution Actions Under CERCLA § 113(f)

While CERCLA § 107 grants a plaintiff a private right of action to recover costs associated with the cleanup of a contaminated site, it does not provide a method for one responsible party to seek contributions from other responsible parties.[121] In 1986, Congress passed the Superfund Amendments and Reauthorization Act [hereinafter SARA], which added CERCLA § 113(f).[122] Under this provision, a person could now seek a contribution from any other party who was also a PRP. Responsibility would now be allocated among the responsible parties using "equitable factors as the

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[116] CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3) (1995 & 1999 WESTLAW electronic update).

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] CERCLA § 107, 42 U.S.C.A.. § 107 (1995 & 1999 WESTLAW electronic update).

[122] Superfund Amendment and Reauthorization Act of 1986, Pub. L. No. 99-499, codified at 42 U.S.C. § 9613(f).

court determines are appropriate."[123] The effect of this amendment was to relieve the harsh consequences of placing the enormous cost of site cleanup on a single party without allowing a mechanism for sharing the costs among responsible parties.

To encourage parties to settle, the 1986 Amendment, adding § 113(f)(2), also provided a shield from further contribution claims once a responsible party enters into an approved settlement with the United States or a State.[124] This section, however, does not shield a PRP from a further action for cost recovery brought under § 107.[125] Without such protection from further cost recovery actions, the protections of § 113(f)(2) are thought to be extremely limited.[126]

Federal Government Liability--Waivers of Sovereign Immunity

CERCLA § 120, entitled "Federal Facilities," provides that all branches of the federal government "shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under [CERCLA § 107] of this title."[127] Prior to the SARA in 1986, essentially identical language was contained in § 107.[128] The new amendments created a new section to deal with issues involving the

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[123] *Id.*

[124] CERCLA § 113(f), 42 U.S.C.A.. § 9613(f) (1995 & 1999 WESTLAW electronic update).

[125] *See* Key Tronic Corp. v. United States, 511 U.S. 809 (1994)("Thus the statute now expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107.").

[126] McCrory, *supra* note 103, at 33.

[127] CERCLA § 120(a), 42 U.S.C.A. § 9620(a) (1995 & 1999 WESTLAW electronic update).

[128] Pub.L. No. 96-510, Title I, § 107(g), 94 Stat. 2783 (1980) (original waiver of sovereign immunity provided that "[e]ach department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under this section."). The 1986 SARA amendments moved nearly identical

cleanup of federal facilities.[129] However, there is no support for the proposition that by moving the language of § 120(a) from § 107 that Congress intended to limit the earlier waiver of sovereign immunity to government actions on federal facilities.[130] Further, the term "person" as used in CERCLA § 107, is defined in § 101 to include the United States government.[131]

Courts interpreting the breadth of the waiver of sovereign immunity have wrestled with two competing concepts. First, as a guiding principle, waivers of sovereign immunity are interpreted narrowly.[132] In contrast, courts construe remedial statutes, such as CERCLA, liberally to accomplish their goals.[133] The § 120 waiver, on its face, clearly states the federal government should be treated the same as any other "person" in assessing liability under the statute.[134] The conflict comes to a head in cases where the government is acting in its sovereign capacity as a regulator—as opposed to as a "person."

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language to the new § 120. Pub.L. No. 99-499, Title I, § 120, 100 Stat. 1666 (1986); *See also,* FMC Corp., 29 F.3d at 842.

[129] CERCLA § 120, 42 U.S.C.A. § 9620 (1995 & 1999 WESTLAW electronic update).

[130] FMC Corp., 29 F.3d at 842. The Third Circuit found the argument limiting government liability to "Federal Facilities" unavailing for three reasons. First, the language in the new § 120 clearly states the government will be held liable the same as any other person. *Id.* Second, the language in § 120 was essentially identical to the earlier waiver contained in the old § 107. *Id.* Finally, the language in the new § 120 provided for government liability under § 107. *Id. See also* Steven G. Davison, *Government Liability Under CERCLA*, 26 B.C. ENVTL. AFF. L. REV. 47, 52-54 (1997); William B. Johnson, Annotation, *Liability of Federal Government under § 107(a) of Comprehensive Environmental Response, Compensation, and Liability Act,* 127 A.L.R. FED. 511, § 5 (1995).

[131] CERCLA § 101(21), 42 U.S.C.A. § 9601(21) (1995 & 1999 WESTLAW electronic update).

[132] United States v. Idaho, 508 U.S. 1(1993); United States v. Nordic Village Inc., 503 U.S. 30 (1992); FMC Corp., 29 F.3d at 839.

[133] FMC Corp., 29 F.3d at 840 (*citing to* United States v. Alcan Aluminum Corp., 964 F.2d 252, 258 (3d Cir.1992).

[134] CERCLA § 120, 42 U.S.C.A. § 9620 (1995 & 1999 WESTLAW electronic update).

In balancing the competing concepts, courts have subdivided regulatory activities into those dealing with cleanup activities and other regulatory activities. Sovereign immunity is invariably recognized when the government is acting in its regulatory capacity to effectuate the cleanup of a site.[135] This immunity is consistent with the grant of immunity to state and local governments for their cleanup activities granted in § 107(d)(2).[136] When the government is involved in regulatory activities other than cleanup activities the trend is to find a waiver of sovereign immunity.[137] Nonetheless, the existence of regulatory oversight alone should be insufficient to find the government liable as a responsible person.[138]

Establishing a waiver of sovereign immunity is only the first step in assessing the liability of the federal government. Even with the waiver, the plaintiff still needs to establish that the government is within the class of PRPs set out in CERCLA §107(a). While this is not a significant

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[135] The majority of these cases involve suits alleging EPA has failed in some manner during cleanup efforts. *See, e.g.,* FMC Corp., 29 F3d 833; In re Paoli R. Yard PCB Litigation 790 F.Supp. 94 (ED Pa 1992), *aff'd without op* 980 F2d 724 (3rd Cir. 1992); United States v Atlas Minerals & Chemicals, Inc. 797 F Supp. 411 (ED Pa, 1992); United States v Azrael 765 F.Supp. 1239 (D.C. Md. 1991); United States v Western Processing Co., 761 F.Supp. 725 (WD Wash 1991).

[136] CERCLA § 107(d)(2), 42 U.S.C.A. § 9607(d)(2) (1995 & 1999 WESTLAW electronic update).

[137] FMC Corp., 29 F.3d at 839-41; United States v. Iron Mountain Mines, 881 F.Supp. 1432 (ED Cal. 1995). *But see* United States v. American Color and Chem. Corp., 858 F.Supp. 445 (MD Pa. 1994)(holding that government immunity is only waived when acting as a business concern and not in a regulatory capacity); Johnson, *supra* note 130, at § 7. *But see,* United States v. Bestfoods, 524 U.S. 51 (1998).

[138] Davison, *supra* note 130, at 83-4, *citing to,* Vertac Chem. Corp., 46 F.3d at 808; Maxus Energy Corp., 898 F. Supp. at 406-7; Lincoln v. Republic Ecology Corp., , 765 F.Supp. 633, 638-39 (C.D. Cal. 1991); United States v. Dart Indus., 847 F.2d 144, 146 (4th Cir. 1988); Hassayampa Steering Comm. v. Arizona, 768 F.Supp. 697, 702 (D. Ariz. 1991); United States v. New Castle County, 727 F.Supp. 854, 874 (D. Del. 1989); New York v. City of Johnstown, 701 F.Supp. 33, 36 (N.D.N.Y. 1988). *Id.*

hurdle when dealing with traditional facilities that are federally owned,[139] it is a far more difficult proposition when examining the relationship between defense contractors and the United States.

Government CERCLA Liability Based on Contractual Relationships

While the waiver of sovereign immunity has not been an insurmountable hurdle, establishing the United States liability as a PRP under CERCLA § 107 is a challenge.[140] The status of the United States as an "owner, operator, or arranger" based on a contractual relationship seldom presents a clear issue.

Owner Liability—Elf Atochem North America, Inc. v. United States

In some situations, defense contractors may assert the government should be liable as an "owner" under CERCLA § 107. The few reported cases have revolved around the definition of "facility" and what constitutes "disposal" of a hazardous substance.[141] Government contracts often involve the use by a defense contractor of government furnished property.[142] While there would be little issue in situations where the government furnished an entire plant, as in the case of a "GOCO"

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[139] *See, e.g.,* FMC Corp., 29 F.3d at 840 ("[A]lthough no private party could own a military base, the government is liable for cleanup of hazardous wastes at military bases because a private party would be liable if it did own a military base.").

[140] *See, e.g., supra* note 96, and accompanying text.

[141] *See, e.g.*, Elf Atochem North America, Inc. v. United States, 868 F.Supp. 707 (ED Pa. 1994)(describing both term "facility" and what constitutes a "disposal"); Mead Corp. v. United States, No. C-2-92-326, slip op., 1994 WL 733567 (S.D. Ohio Jan. 14, 1994) (describing both term "facility" and what constitutes a "disposal"); Kaiser Aluminum & Chem. Corp. v. Catellus Development Corp., 976 F.2d 1338 (9th Cir. 1992)(describing broad reach of term "disposal").

[142] Government policy is to ordinarily require contractors to furnish all property necessary to perform a government contract. FAR 45.102. However, there are many situations where government property, including materials and production facilities are used in the performance of government contracts. *See* JOHN CIBINIC, JR. & RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 619 (3d ed. 1995). Part 45 of the FAR governs the use of government furnished property in government contracts. FAR Pt. 45.

(government-owned contractor-operated facility),[143] the issue is murkier when the government provides machinery or equipment that is used at a defense contractor plant.

One such case is *Elf Atochem North America, Inc. v. United States*.[144] Elf Atochem of North America, Inc. (Elf) owned and operated a plant in Pittstown, New Jersey.[145] Elf produced the pesticide DDT for use during World War Two. The pesticide was produced pursuant to a contract with the United States in support of the war effort. The government considered DDT a strategic pesticide vital to the war effort in Europe. As part of the contract, the United States leased to Elf the equipment necessary to produce the DDT.[146] The parties installed the equipment at the contractor's plant and connected it using company-owned pipes to waste ponds.[147]

Today, the site is contaminated with chlorobenzene and benzene--both are byproducts of DDT production.[148] The Environmental Protection Agency (EPA) placed the site on the National Priority

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[143] FAR 45.301 (defining "facilities" as used in FAR to include "plant equipment and real property").

[144] 868 F.Supp. 707 (ED Pa. 1994); *See also* Rospatch-Jessco Corp. v. Chrysler Corp., 962 F.Supp. 998 (WD Mich. 1995)(acknowledging government ownership of equipment but unable to determined whether there was a release of hazardous waste from the equipment to support government liability)

[145] 868 F.Supp. at 708, 713.

[146] *Id.* at 708.

[147] *Id.* at 708, 710.

[148] *Id.* at 708.

List (NPL) in 1983.[149] Subsequently, Elf entered into a consent decree with the EPA.[150] Elf then brought an action under CERCLA § 113(f), seeking contribution from the United States as a PRP.[151]

The district court set out a five-part test for liability—Elf needed to show "that the United States 1) owned 2) a facility 3) at which hazardous substances 4) were disposed 5) and from which there is a release or threatened release 6) for which response costs have been incurred.[152] Ownership of the leased equipment was not an issue.[153] Both the United States and the district court acknowledged the expansiveness of the term "facility" as defined under CERCLA § 101(9)(A).[154] There was no dispute that the government owned the leased equipment and that the equipment fell within the CERCLA definition of "facility."[155] Additionally, both parties agreed the DDT byproducts qualified as hazardous substances under the CERCLA § 101(14).[156] Further, neither party disputed that Elf had incurred response and cleanup costs.[157]

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[149] *Id.*

[150] *Id.*

[151] *Id.* *See supra* notes 121-126 and accompanying text for a discussion of contribution actions under CERCLA § 113(f).

[152] *Elf Atochem*, 868 F.Supp. at 709. This is a slightly expanded recitation of the elements required to prevail under CERCLA § 107 than set out by other courts. *See supra* note 110 and accompanying text.

[153] *Elf Atochem*, 868 F.Supp. at 709.

[154] *Id.* *See supra* note 106 describing definition of "facility."

[155] *Elf Atochem*, 868 F.Supp. at 709.

[156] *Id.* at 709-10. Hazardous substances are broadly defined to include both listed and characteristic hazardous waste under RCRA, as well as hazardous wastes listed under other substantive environmental law including the CAA, and CWA. CERCLA § 101(14), 42 U.S.C.A. § 9601(14) (1995 & 1999 WESTLAW electronic update).

[157] *Elf Atochem*, 868 F.Supp. at 712.

The primary point in contention was whether there was a "disposal" of the hazardous substance from the government-owned "facility."[158] The court acknowledged that CERCLA was not intended to cover internal waste streams that were to be reclaimed or put to new use.[159] In addition, the court understood that the prevailing view among the circuits was that "disposing" requires an affirmative act where the "material were considered waste and were thrown out, got rid of, or dumped."[160] While once again both parties agreed the product leaving the government equipment was "waste," they disagreed as to the location of the disposal.[161] The United States argued that "disposal" required exposure to the environment.[162] The court rejected this argument as too narrow, instead finding that "when each of the waste streams left the United States' equipment it was being sent to the pipes as a means of getting rid of it, transferring it, throwing it out; in other words disposing of it."[163]

The final issue was whether a "release" or "threatened release" of a hazardous substance occurred.[164] The United States, again narrowly focused, argued that the government-owned

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[158] *Id.* at 710-12.

[159] *Id.* at 710 (citing to H.R.REP. NO. 1491. 94th Cong.2d Sess. 2 (1976), *reprinted in* 1976 U.S.C.A.N. 6238, 6240 for legislative intent).

[160] *Id.*

[161] *Id.* at 710-11.

[162] *Id.* The United States based it opinions on two asbestos cases where discharges to a closed environment did not constitute disposal. 3550 Stevens Creek Assoc. v. Barclays Bank, 915 F.2d 1355, 1392 (9th Cir. 1990), *cert. denied,* 500 U.S. 917 (1991); Tragarz v. Keene Corp., 980 F.2d 411, 427 (7th Cir. 1992). The *Elf* court distinguished the asbestos cases because they dealt with the productive use of a hazardous substance rather than a waste stream as in the instant case. 868 F.Supp. at 710.

[163] 868 F.Supp. at 711.

[164] *Id.* at 712.

equipment discharged hazardous waste into Elf's pipes--not the environment.[165] The court declined to agree, instead determining that the word "release" should be construed broadly.[166] The only requirement is an "eventual release, not an actual or imminent one."[167] In addition, the court was not swayed by the concerns of other courts that this reasoning might "improperly merge owner liability into generator liability" if the release were to occur at a time separate from disposal.[168] In this case, "[t]he United States [was] not being sued for creating waste that was later released into the environment through no fault of its own. Rather, the United States [was] being sued for disposing of its waste directly from its equipment into pipes that lead directly to the environment."[169]

Under the rationale set out in *Elf Atochem*, the government may incur liability as an "owner" of a "facility" as defined under CERCLA § 107 by providing government furnished property. In addition, the government may be liable when the contractor purchases equipment for which the government will reimburse the contractor as a direct cost under the contract.[170] In these situations, title for the equipment often passes to the government pursuant to contractual clauses—making the government the owner of the "equipment"[171]—and possibly a CERCLA "facility." This was the

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[165] *Id.*

[166] *Id.*

[167] *Id.* (citing to Amland Props. Corp. v. Aluminum Corp., 711 F.Supp. 784, 793 (D.N.J. 1989)).

[168] *Id.*

[169] *Id.*

[170] For a discussion of situations in which contract property becomes government property, see CIBINIC & NASH, *supra* note 142, at 620-22.

[171] Government contracts often contain clauses detailing situations in which title to contract property passes to the government. In fixed-price contracts the standard clause provides:

situation in *Mead Corp. v. United States,* an unpublished district court opinion.[172] Although the government was the "owner" of a "facility," the *Mead* court did not find a "release" because the hazardous waste was disposed of at a different time and location away from the "facility."[173]

Liability in these cases is extremely fact specific and may depend on contract clauses defining ownership of property. Without being able to show actual government ownership of the affected facility, defense contractors have to look to a different theory on which to hold their contracting partner, the United States, liable.

Operator Liability—FMC Corp. v. United States

Without the facts necessary to show government ownership of a "facility," defense contractors often assert the government should be liable as an "operator" for the disposal of a hazardous substance. There are at least a few cases, mentioned below, where the contractor was able to establish

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> If this contract contains a provision directing the Contractor to purchase material for which the Government will reimburse the Contractor as a direct item of cost under this contract--
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> (i) Title to material purchased from a vendor shall pass to and vest in the Government upon the vendor's delivery of such material; and
> (ii) Title to all other material shall pass to and vest in the Government upon--
>
> (A) Issuance of the material for use in contract performance;
> (B) Commencement of processing of the material or its use in contract performance; or
> (C) Reimbursement of the cost of the material by the Government, whichever occurs first.

FAR 52.245-2(c)(4).

[172] *See* Mead Corp. v. United States, No. C-2-92-326, slip op., 1994 WL 733567 (S.D. Ohio Jan. 14, 1994).

[173] *Id.* In *Mead*, pursuant to the contract the government owned equipment used by the defense contractor to manufacture munitions. *Id.* at 1. The waste was disposed of trenches on site at the contractor plant. *Id.* at 2. The court declined to find the government liable, apparently reasoning the

the "actual control" necessary to show the government acted as an "operator." Government regulation of an industry has never been sufficient in itself to establish the government liability as an "operator."[174] Instead, the courts have focused on the pervasive nature of the government's involvement with a contractor facility.

FMC Corp. v. United States

FMC Corp. v. United States [FMC], a Third Circuit case, is the seminal case dealing with government "operator" liability based upon a wartime contract.[175] The case involved a facility located in Front Royal, Virginia that was owned and operated by American Viscose from 1937 until 1963. In 1963, FMC purchased the plant. In 1982, an EPA inspection revealed a hazardous substance in the groundwater near the site. The substance, carbon bisulfide, is a chemical byproduct from the production of rayon. EPA began a cleanup and informed FMC of their liability under CERCLA. In 1990, FMC brought an action against the United States pursuant to CERCLA § 113(f) seeking contribution for the cost of cleanup.[176] They alleged, among other things, that the government was liable as an "operator" based on the government's pervasive involvement in a World War II contract with American Viscose.[177]

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government did not own the trenches. *Id.* at 4. The court found the release must occur at the facility from which the waste was disposed. *Id.* at 5.

[174] East Bay Municipal Utility District v. United States, 142 F.3d 479 (D.C. Cir. 1998)(wartime mining operation was not sufficiently controlled by federal government to establish operator liability).

[175] FMC Corp. v. United States, 29 F.3d 833 (3rd Cir. 1994). For an argument that the government should not be liable for its contractual relationships when it is acting in a regulatory capacity, see Van S. Katzman, *The Waste of War: Government CERCLA Liability at World War II Facilities,* Note, 79 VA. L. REV. 1191 (1993).

[176] *Id.* at 835.

[177] *Id.* FMC alleged the government was liable as an "owner," "operator," and "arranger." *Id.* The government admitted to "owner" liability as it applied to government equipment at the plant. *Id.* at 854 (dissent). The court expressed no opinion as to "arranger" liability and merely affirmed the

Based on the facts presented, the court found the United States liable as an "operator" under CERCLA § 107.[178] First, the court dealt with the waiver of sovereign immunity.[179] Using the reasoning discussed earlier, the court found the United States had waived its sovereign immunity and was subject to suit.[180] Next, the court turned to the issue of liability as an "operator" and applied the "actual control" test.[181]

The "actual control" test was originally developed in the context of related corporations.[182] Under the test, one corporation would be liable for the actions of another if it had "substantial control over the other corporation. At a minimum, substantial control requires 'active involvement in the activities' of the other corporation."[183] The court extended the application of the test to situations where "the government [has] 'substantial control' over [a] facility and [had] 'active involvement in

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decision of the district court. *Id.* at 846. The contract in question was entered into after the attack on Pearl Harbor. It called for the production of high tenacity rayon—vital to the production of war-related products like airplane and truck tires. The War Production Board directed American Viscose's production of high tenacity rayon; it was a diversion from the factory's ordinary production of textile rayon. American Viscose was required to comply with War Production Board requirements or face seizure by the federal government. The production of high tenacity rayon involved the use of government-owned machinery, which was leased back to American Viscose. Adjacent to the site, the government built a plant to supply raw materials by direct pipeline. The government had representatives on site with authority to promulgate rules governing all operations at the site. The government was involved in investigating and resolving labor problems. In addition, the government was aware of the generation of hazardous waste and the disposal of 65,500 cubic yards of waste at highly visible on-site basins. *Id.* at 836-38.

[178] *Id.* at 846.

[179] *Id.* at 838-43.

[180] *See supra* notes 127-138 and accompanying text for a discussion of the sovereign immunity.

[181] *FMC*, 29 F.3d at 843-45.

[182] *Id.* at 843. *See also* Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209 (3rd Cir. 1993)(developing "actual control" test as applied to corporations).

[183] *FMC*, 29 F.3d at 843.

the activities' there."[184] The test is "inherently fact-intensive" and based on "the totality of the circumstances presented."[185]

The court focused on the government's "considerable day-to day control over American Viscose." There were five factors the court pointed to. First, the government directed the production of the high tenacity rayon, diverting American Viscose from its ordinary business. Second, the government maintained significant control over the process through regulations, inspectors, and the possibility of seizure. Third, the government supplied the raw materials from government built plants, supplied an increased work force, and helped supervise employees. Fourth, the government furnished machinery used in the production of the rayon. Finally, the government set the price of the rayon and determined the marketing.[186]

The dissent in *FMC* applied the same test but argued that involvement in "nuts-and-bolts management decisions [are] necessary for [operator] liability under CERCLA."[187] According to the dissent, the majority misconstrued the facts by neglecting the following aspects. First, American Viscose performed the production of rayon for profit, subject to the same rules as the entire industry. Next, the firm's management remained in place and actually performed the day to day scheduling and employee decisions. Additionally, the raw materials involved in the contamination were supplied by third parties, not the government. Furthermore, the government's involvement with employees at the plant was at the request of American Viscose. Finally, the government's ownership of equipment

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[184] *Id.* The Eighth Circuit adopted the same "actual control" test for application to defense contracts in United States v. Vertac, 46 F.3d 803 (8th Cir. 1995).

[185] *Id.* at 845.

[186] *Id.* at 844.

[187] *Id.* at 851(dissent) (*citing to,* FMC v. United States, 786 F.Supp. 471 (E.D. Pa. 1990).

subjects it to owner liability—not operator liability. Based on this rendition of the facts, the dissent would not find the government liable as an "operator" of the facility.[188]

Courts applying this same test to Vietnam era wartime contracts have not found the same degree of pervasive control by the government sufficient to justify government liability.[189] Given the unique fact-specific nature of the holding in FMC, it is unsurprising that few defense contractors would be able to satisfy the "actual control" test sufficiently to prove government liability.

"Actual Control" After United States v. Bestfoods

In *United States v. Bestfoods,* a unanimous United States Supreme Court took on the issue of "actual control" in the context of corporate liability in parent-subsidiary relationships.[190] The Court distinguished between derivative and direct liability.[191] Consistent with state law, the Court held that when (but only when) the corporate veil may be pierced, may a parent be held liable for a subsidiaries violations of CERCLA. Otherwise, the focus is on the direct liability of the parent.[192] The Court noted that the nature of the parent-subsidiary corporate relationship was irrelevant to the issue of direct liability.[193] Instead, the actions of the parent as an "operator" are critical.[194] The Court went on to clarify the definition of "operator" as it applies to the corporate relationship:

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[188] *Id.* at 852-54.

[189] United States v. Vertac Chemical Corp., 46 F.3d 803 (8th Cir. 1995)(government not liable as an operator or arranger for production of Agent Orange during Vietnam conflict at contractor plant); Maxus Energy Corp. v. United States, 898 F.Supp. 399 (N.D. Tex. 1995)(government not liable using same reasoning as United States v. Vertac).

[190] 524 U.S. 51 (1998).

[191] *Id.* at 65.

[192] *Id.*

[193] *Id.*

> [U]nder CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. To sharpen the definition for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.[195]

After *Bestfoods,* the Third Circuit's reasoning in *FMC* seems suspect.[196] Certainly, one could argue that the "actual control" test survives as applied to government-contractor relationships. After all, the Third Circuit recognized the test was developed in the context of related corporation and only applied it to government-contractor relationships because it was "instructive."[197] More damaging to their logic is the Supreme Court's admonition that the focus for "operator" liability is on operations directly related to disposal of hazardous waste and environmental compliance.[198] Few, if any, of the factors detailed by the Third Circuit for finding the government liable as an operator are related to hazardous waste disposal.[199]

In light of the high hurdles set by *FMC*, and raised immeasurably by *Bestfoods*, defense contractors will be unlikely to prevail by alleging the government is liable as an "operator' based on their contractual relationship. The next possibility is to allege the government is liable as an "arranger."

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[194] *Id.* at 66.

[195] *Id.* at 66-67.

[196] *See* Major Romans, Supreme Court Clarifies Corporate Liability for Parent Corporations, ARMY LAWYER, Oct. 1998, at 64.

[197] *FMC*, 29 F.3d at 843.

[198] *Bestfoods*, 524 U.S. at 66-67.

[199] *See supra* note 186 and accompanying text; Romans, *supra* note 196, at 64.

Arranger Liability: United States v. Vertac

The Eighth Circuit addressed "arranger" liability as it applies to defense contractors in *United States v. Vertac.*[200] *Vertac* involved a Vietnam era defense contract for production of Agent Orange as discussed in Section I. Based on the facts as alleged, the Eighth Circuit did not find the government liable as a "operator," or an "arranger."[201]

The court rejected the Hercules' "operator" argument applying the "actual control" test as set out in *FMC* above.[202] The Eighth Circuit then turned to the issue of "arranger" liability. The legal standard for determining whether one is liable for arranging the disposal or treatment of a hazardous substance is whether they "had the authority to control, and did control" the production leading to the hazardous waste.[203] The court acknowledged that there was no requirement to prove "personal ownership or actual physical possession of hazardous substances as a precondition" for finding arranger liability—such a requirement would "be inconsistent with the broad remedial purposes of CERCLA."[204]

However, the court placed serious limitations on the ability to find the United States liable as an "arranger" based on wartime contracts. First, the court dismissed Hercules' argument that the government was liable based on the United States regulatory powers. "A governmental entity may not be found to have owned or possessed hazardous substances [as an "arranger"] merely because it had statutory or regulatory authority to control activities which involved the production, treatment or

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[200] 46 F.3d 803 (8th Cir. 1995).

[201] *Id.* at 809, 811.

[202] *Vertac*, 46 F.3d at 807-809; *See supra* notes 182-186 and accompanying text.

[203] *Vertac*, 46 F.3d at 810.

disposal of hazardous substances."[205] Instead, the court would require immediate supervision and direct responsibility for the transportation or disposal of the hazardous substances generated at a facility. The court found none of the required supervision or any responsibility for waste disposal in the facts presented by Hercules.[206]

Hercules countered by arguing that in addition to the regulatory powers, the additional nature of the contractual relationship was enough to establish government liability. The court suggests that in certain circumstances "a government contract [may involve] sufficient coercion or governmental regulation and intervention to justify the United State's liability as an arranger under CERCLA."[207] However, the fact that the government could require the contractor to perform the contract and give it priority over other contracts was not sufficient for such a finding.

Hercules also argued that the United States, by supplying raw materials, in addition to having the authority to control the supply, production process, and end product, should be liable as an "arranger."[208] The contractor analogized the situation to *Aceto.*[209] In that case, a chemical manufacturer hired an independent contractor to formulate pesticides. The manufacturer owned the raw materials, the work in progress, and the end product. Actual ownership throughout the process was sufficient to allege "arranger" liability, even though the manufacturer was not actually involved

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[204] *Id.* (*quoting* United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 743 (8th Cir. 1986).

[205] *Id.*

[206] *Id.*

[207] *Id.* at 811 (*citing to* Northeastern Pharmaceutical & Chem. Co., 810 F.2d at 886).

[208] *Id.*

[209] *See* United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373 (8th Cir, 1989).

in the treatment or disposal of the hazardous substance.[210] In the present case, the court was not convinced that Hercules could show the United States supplied or owned either the raw material or work in progress.[211] Facilitating the acquisition of raw materials and the minimal involvement in the production process was insufficient to support the allegation. Thus, the court rejected each rationale asserting the government was liable as an "arranger."[212]

While *Vertac* leaves open the possibility that a contractual relationship may lead to government liability, the circumstances appear quite limited.[213] Like the Supreme Court in *Bestfoods*, the court appears to be focused on the government's direct involvement in the production

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[210] *Id.* at 1382.

[211] Vertac, 46 F.3d at 811.

[212] *See also* Maxus Energy Corp. v. United States, 898 F.Supp. 399 (N.D. Texas 1995). Like Vertac, Maxus involved a Vietnam era contract for the production of Agent Orange. *Id.* at 402. Factually, the cases are nearly identical, although the contractor in Maxus did not dispose of barrels on site, most of the contamination was from leakage and spilling. The district court analyzed the contractors claim that their case was analogous to Aceto. *Id.* at 406. Once again, the court did not find government actual or constructive ownership of the raw materials or control over the manufacturing process. The court refused to impose liability based upon the buyer-seller relationship under the contract. The court pointed to the contractor's efforts to seek out government contract work. *Id.*

[213] *See* United States v. Shell Oil, CV 91-0589-RJK (1995 U.S. Dist. LEXIS 19778) (CD Cal. 1995)(unpublished). The district court in Shell Oil took exception to the analysis of "arranger liability" in *Vertac* and found the United States liable based on a World War II era contract for aviation fuel. *Id.* at 22. The court based found the government to be an arranger because its control over the raw materials amounted to "ownership." *Id.* In rejecting *Vertac* the court reasoned:

> When the Government, as a practical matter, orders a private company to supply a finished product, dictates the delivery dates, the quantity to be shipped, the prices of the materials, the specifications of the raw materials, and provides the transportation for the raw materials, there can be no question but that it is "supplying" the raw materials within the meaning of *Aceto*.

Id. at 22.

and disposal of hazardous waste.[214] The ordinary contractual relationship between buyer and seller will not result in government liability.

Allocation of Cost Under CERCLA § 113(f): United States v. Shell Oil

In the event that a defense contractor is able to show the government is also a potentially responsible party as either an "owner," "operator," or "arranger," the allocation of liability under CERCLA § 113(f)(1) must be adjudicated.[215] The courts are given remarkable discretion to apply "equitable factors as the court determines are appropriate." In the context of a wartime defense contract, a district court made just such an allocation in United States v. Shell Oil Co.[216]

Shell Oil involved the cleanup of the McCroll Superfund Site, a twenty-two acre site near Fullerton, California. The site was contaminated with acid sludge byproducts from the production of high-octane aviation fuel during World War II. The fuel was produced for the military under heavily regulated government contracts.[217] Despite claims of the "act of war," and "innocent landowner" defenses, the district court found the oil companies liable as CERCLA "arrangers" in an earlier proceeding.[218] In an unpublished order, the United States was also adjudged liable as an "arranger."[219]

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[214] *See supra* notes 190-195 and accompanying text.

[215] CERCLA § 113(f), 42 U.S.C.A.. § 9613(f) (1995 & 1999 WESTLAW electronic update); S*ee supra* notes 121-126 and accompanying text.

[216] 13 F.Supp.2d 1018 (CD Cal. 1998).

[217] *Id.* at 1020.

[218] United States v. Shell Oil Co., 841 F.Supp. 962 (CD Cal. 1993)(district court opinion discussing Shell Oil liability for cleanup of McCroll Superfund Site).

[219] 13 F.Supp.2d at 1019; *see supra* note 213.

During the War, the War Production Board and the Petroleum Administration subjected the oil industry to intense oversight. The degree of oversight included directives concerning supply of raw materials, quarterly inventories, quantities to produce, quality of fuel produced, and manufacturing specifications. Companies refusing to cooperate were subject to takeover, and individuals subject to criminal prosecution. The huge volumes demanded by the government resulted in by-products too great to be reused, treated, or disposed based on the facilities available. The shortage of railroad tank cars precluded shipment of the waste to oil company facilities in Richmond, California. The government would not allow the oil companies to build treatment facilities. The government was aware, and at least tacitly agreed, to the oil companies contracting with McCroll to dump the hazardous byproducts at the McCroll site.[220]

The court, applying equitable factors, found the government 100 percent liable for the waste associated with the aviation fuel program.[221] The court articulated three reasons. First, equitable principles should place the cost of war on the United States as a whole as opposed to an individual contractor.[222] "The American public stood to benefit from the successful prosecution of the war effort, so too must the American public bear the burden of a cost directly and inescapably created by the war effort."[223]

The other two reasons dealt with the blameless action of the oil companies. The oil companies had no alternative to land disposal since the government use precluded the availability of tank cars

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[220] *Id.* 1019-24.

[221] *Id.* at 1027.

[222] *Id.* (analogizing the oil company contract to the situation at the rayon plant in, FMC Corp. v. United States, 29 F.3d 833 (3rd Cir. 1994)). *See supra* notes 175-188 for a discussion of the FMC case.

[223] *Id.*

necessary for proper movement of the byproducts to the facility in Richmond, California. Finally, the government would not approve the oil companies plans to build treatment plants.[224]

Once again, the success of the defense contractor even in the allocation process is extremely fact specific. Not many defense contractors will be able to show the degree of control the government exerted in Shell Oil, nor the blameless conduct of the contractor. The focus appears to be on the relative culpable conduct of the contracting parties and the degree to which each party benefited from the disposal of the hazardous substance.

Section Summary

Despite the staggering costs involved, and the sentiment that society as a whole benefits from the successful prosecution of war and should therefore bear the costs as a whole—defense wartime contractors have been remarkably unsuccessful in seeking contributions for the cleanup of defense facilities from the United States. The hurdles enacted by Congress, as interpreted by the courts, greatly limit the situations where a defense contractor will make a successful showing of government liability. CERCLA does not mention contractual relations as a basis for liability—and the courts do not seem likely to create such a basis. Except in the rare case of actual government ownership of a facility operated by a contractor, "owner" liability will not apply. Even rarer will be instances where a contractual relationship will involve the degree of control over the manufacture, disposal, or treatment of hazardous waste to hold the government liable under an "operator" or "arranger" theory. Most contractors will have to seek another avenue to recover a share of the cost of cleanup—one such possibility is under a breach of contract theory.[225]

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[224] *Id.* at 1027-28.

[225] *See* Bunn, *supra* note 11. For an argument that CERCLA costs are more likely to be recovered under a CERCLA theory than under the contract, see Kannan, *supra* note 92, at 49-50.

SECTION III: CONTRACTOR RECOVERY UNDER THE CONTRACT

Dealing with the Sovereign—The Government's Split Personality

While contractors may be perplexed by the difficulty of seeking contributions from the United States under CERCLA, they face an even more daunting task wading through the complexities of government procurement law. Contractors seeking reimbursement for CERCLA cleanup costs under a contract theory are arguing in essence that the government should assume the financial burden of changes in the law that increase the cost of contract performance. These arguments are generally based on either explicit or implicit promises by the government that they will assume the risk of such a change in the law. While this argument may be relatively new in the context of environmental cleanup costs, defense contractors have been making similar arguments since the days of the Civil War—only a few years after Congress passed legislation allowing for breach of contract claims to be brought against the United States.

The United States Court of Claims was established by statute in 1855 to hear claims, including contractual claims.[226] Prior to this time, Congress handled such matters on an ad hoc basis by passing private legislation.[227] Therefore, the court was writing on a largely clean slate. Many of the principles developed in the early cases survive today as courts sort out the circumstances under which the

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[226] Act of Feb. 24, 1855, ch. 122, 10 Stat. 612 (1855). This statute was a predecessor to the Tucker Act that gave the Court of Claims jurisdiction to hear claims against the United States. Act of Mar. 3, 1887, ch. 359, 24 Stat. 505 (1887). Today these functions are handled by the United States Claims Court which was established by the Federal Courts Improvement Act of 1982. P.L. 97-164, 96 Stat. 25 (1982). The court was renamed the United States Court of Federal Claims in 1992 by the Federal Courts Administration Act of 1992. P.L. 102-572, 106 Stat 4506 (1992). For an interesting article about the history and jurisdiction of the United States Court of Claims, see Richard H. Seamon, *Separation of Powers and the Separate Treatment of Contract Claims Against the Federal Government for Specific Performance,* 43 VILL. L. REV. 155 (1998).

[227] See William L. England, Jr., Constitutionality of Article I Court Adjudication of Contract Disputes Act Claims, 16 PUB. CONT. L.J. 338, 341 (1987).

government will be treated as any other contracting party—and in what circumstances special exceptions should apply. Today, these competing methods of treating the government in its contractual relationships are sometimes referred to as the "congruence," and the "exceptionalism" theories.[228] The United States Court of Claims first addressed the dichotomy between the government as lawgiver and the government as contracting partner when a Civil War defense contractor was stung by a change in the law.[229]

United States v. Deming involved a contract between Israel Deming and the United States Marine Corps, for the purchase of rations during the Civil War.[230] In 1861, the quartermaster, on behalf of the United States, entered into a contract for the daily supply of rations.[231] In August of that same year, Congress passed a duty on some of the supplies making up the rations.[232] Despite the loss, Israel Deming continued to supply rations for the remainder of the year.[233] In 1862, Deming again entered into a contract with the Marines to supply rations. In February 1862, Congress passed the Legal-Tender Act, which raised the cost of contract performance[234]—and once again the contractor

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[228] See generally Joshua I. Schwartz, Liability for Sovereign Acts: Congruence and Exceptionalism in Government Contracts Law, 64 GEO. WASH. L. REV. 633 (1996).

[229] *Id.* at 651-65.

[230] Deming v. United States, 1 Ct.Cl. 190 (1865).

[231] *Id.* at 190.

[232] *Id.*

[233] *Id.*

[234] Legal Tender Act of 1862, ch. 33, 12 Stat. 345 (1862). This statute made the federal currency paper-based and not backed up by a gold standard—resulting in a devaluation of the currency. 1 Ct.Cl. at 190.

suffered a loss.[235] The contractor filed suit for $3,558.48 for damages caused by the imposition of new conditions upon the contracts.[236]

In one brief paragraph, the United States Court of Claims set for both what became known as the "Sovereign Acts" doctrine and explained the dual nature of the government as sovereign and the government as a private contractor:

> This statement of his case is plausible, but is not sound. And herein is its fallacy: that it supposes general enactments of Congress are to be construed as evasions of his particular contract. This is a grave error. A contract between the government and a private party cannot be specially affected by the enactment of a general law. The statute bears upon it as it bears upon all similar contracts between citizens, and affects it in no other way. In form, the claimant brings this action against the United States for imposing new conditions upon his contract; in fact he brings it for exercising their sovereign right of enacting laws. But the government entering into a contract, stands not in the attitude of the government exercising its sovereign power of providing laws for the welfare of the State. The United States as a contractor are not responsible for the United States as a lawgiver were this action brought against a private citizen, against a body corporate, against a foreign government, it could not possibly be sustained. In this court the United States can be held to no greater liability than other contractors in other courts.[237]

The court elaborated on the dual nature of the government in a second case during the same term.[238] The court asserted that the government, while being sued as a contracting party, cannot be made liable for its acts as a sovereign.[239] Further, the court stated that:

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[235] *Id.*

[236] *Id.*

[237] *Id.*

[238] Jones v. United States, 1 Ct.Cl. 383 (1865).

[239] *Id.* at 384.

> In this court, the United States appear simply as contractors; and they are to be held liable only within the same limits as any other defendant would be in any other court. Though their sovereign acts performed for the general good may work injury to some private contractors, such parties gain nothing by having the United States as their defendants.[240]

While the "Sovereign Acts" doctrine is only one theory advanced for relieving the government from liability for changes in the law, these cases underscore the complexities involved in dealing with the "split personality" of the government as both a contracting partner and as a sovereign.[241]

Over the years, courts have continued to struggle over the nature of the government as a contracting partner. The courts developed several judicial theories for limiting the government's liability for contractual obligations based on changes in the law. In addition to the "sovereign acts doctrine," a restriction known as the "unmistakability doctrine" requires surrender of sovereign power to be in unmistakable terms.[242] The "reserved powers" doctrine prevents a sovereign from surrendering certain state powers under any condition.[243] In order for an agent to contract away the sovereign powers of the United States requires an "express delegation" of that authority.[244] The United States Supreme Court addressed each of these theories in *United States v. Winstar,* a case

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[240] *Id.*

[241] What is now known as the "sovereign acts" doctrine was explicitly adopted by the United States Supreme Court in only a single case, *Horowitz v. United States*, 267 U.S. 458 (1925), a three-page opinion, prior to its acceptance in *United States v. Winstar.* 518 U.S. at 923 (Scalia, concurring opinion).

[242] The modern "unmistakability doctrine" traces its roots to cannons of construction that disfavor implied government obligations in contracts. 518 U.S. at 874. *See* Providence Bank v. Billings, 4 Pet. 514, 7 L.Ed. 939 (1830); Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 11 Pet. 420, 9 L.Ed. 773 (1837).

[243] The "reserved powers doctrine" also traces its roots to the first half of the nineteenth century and shares its origin with the "unmistakability doctrine." 518 U.S. at 874; West River bridge Co. v. Dix, 6 How. 507, 12 L.Ed. 535 (1848); Stone v. Mississippi, 101 U.S. 814 (1880); Lynch v. United States, 292 U.S. 571 (1934).

holding the government liable for an implied promise to assume the risk of a future change in the law.[245]

Allocating the Costs of Changes in the Law--United States v. Winstar

On July 1, 1996, the Supreme Court issued a ninety-eight-page opinion.[246] The fragmented decision contains a plurality opinion by Justice Souter, a concurrence by Justice Breyer, a separate opinion concurring in the judgment by Justice Scalia, joined by Justices Kennedy and Thomas, and a dissent by Chief Justice Rehnquist joined in part by Justice Ginsburg.[247] The decision has generated scores of law review articles, many critical of the reasoning employed by the justices.[248] The opinions do little to clarify a confusing area of the law.

Factual Background

Winstar involves a suit brought against the United States by three financial institutions (thrifts). The suit alleged a contractual breach and an unconstitutional taking by the United States brought about by the passage of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).[249] The basis for the dispute involved the savings and loan crisis in the 1980s.

In the late 1970's and early 1980's, the combination of high inflation and high interest rates caused the failure of numerous savings and loans. The response of government regulators was to

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[244] *See, e.g.,* Home Telephone & Telegraph v. City of Los Angeles, 211 U.S. 265 (1908).

[245] 518 U.S. 839.

[246] *Id.* The opinions span pages 839-937 of the U.S. reporter.

[247] *Id.*

[248] A KeyCite of the *Winstar* decision conducted on March 4, 2000 indicated 104 secondary sources discussing the decision, many in a critical light.

[249] Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub.L. No. 101-73, 103 Stat. 183 (codified in part at 12 U.S.C. § 1464 (1994)).

deregulate the industry and reduce capital reserve requirements. Despite, and perhaps because of these measures, the savings and loan industry continued to falter and many thrifts failed. The Federal Savings and Loan Insurance Corporation (FSLIC) became stretched to the point that it lacked the resources to liquidate all of the failing thrifts. To avoid the impending crisis, the Bank Board decided to encourage healthy thrifts and outside investors to buy out the failing thrifts in "supervisory mergers."[250]

Obviously, the liabilities of the failing thrifts exceeded their assets making them poor investments for other institutions. In addition, the FSLIC was in no position to offer a cash subsidy equal to the difference between the failed thrifts liabilities and assets. Instead, the Bank Board offered "cash substitutes" in the way of special accounting procedures. One incentive was to allow the acquiring institution to count "supervisory goodwill" towards the reserve requirement. "Supervisory goodwill" was the excess of the purchase price for the failed thrift over its assets. Without this incentive the acquisition would be impossible since the gaining thrift would, in most cases, become insolvent immediately after the purchase. Another incentive was to allow the acquiring institution to amortize the "supervisory goodwill" over periods of up to forty years. This allowed the thrifts to show "paper profits" in the initial years after the acquisition and seem more profitable than they were. A third incentive was to allow the acquiring thrift to use cash contributions from the FSLIC as "capital credit." Without requiring the thrift to subtract the amount from the "supervisory goodwill," this led to double counting of the amount in the capital reserve.[251]

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[250] The plurality opinion sets out the factual background of the case in great detail. *See* 518 U.S. at 844-61.

[251] *Id.*

The three thrifts involved in this case, Glendale Federal Bank, Winstar Corporation, and The Statesman Group, Inc. entered into agreements with the Bank Board in 1981, 1984, and 1988 respectively. The agreements involved the incentives discussed above.[252]

In 1989, responding to public pressure, Congress passed FIRREA. The legislation had immediate and drastic effects on the savings and loan industry. The FSLIC was abolished and the Office of Thrift Supervision under the Treasury Department replaced the Bank Board. More importantly many of the "incentives" previously agreed to by the Bank Board were outlawed. Thrifts were required to maintain three percent of their total assets as core capital. Intangible assets, such as "supervisory goodwill," were no longer counted as part of the required core capital. A transition rule allowed the "supervisory goodwill" to be counted as half the core capital requirement, but only through 1995.[253]

Federal regulators seized and liquidated both Winstar and Statesman soon after FIRREA became law—because the thrifts did not meet the new capital requirements. Glendale avoided seizure, but only because of massive private investment. Each of the institutions filed suits that followed a tortuous path to the United States Supreme Court.[254] In 1996, six years after first bringing

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[252] *Id.*

[253] *Id.*

[254] Each party originally filed suit in the Court of Federal Claims and was granted summary judgment against the United States for breach of contract. *See* Winstar Corp. v. United States, 21 Cl.Ct. 112 (1990) (finding an implied-in-fact contract but requesting further briefing on contract issues); 25 Cl.Ct. 541 (1992)(finding contract breached and entering summary judgment on liability); Statesman Savings Holding Corp. v. United States, 26 Cl.Ct. 904 (1992) (granting summary judgment on liability to Statesman and Glendale). The courts rejected the government's two central defenses based on the "unmistakability doctrine" and the "sovereign acts" doctrine. *See* 518 U.S. at 859. The cases were consolidated on appeal to the Federal Circuit. Winstar Corp. v. United States, 994 F.2d 797 (Fed. Cir. 1993). A panel from the Federal Circuit reversed, finding the allocation of the risk to the government was not "unmistakable." *Id.* at 811-13. On rehearing *en banc*, the full court reversed the

suit, the Supreme Court heard the case and delivered a very fragmented decision affirming the government's liability in this situation.

Plurality opinion of Justice Souter—Focusing on risk allocation

Risk-Shifting Agreement?

Justice Souter begins his opinion by deferring to the lower courts on the question of whether a contract even existed between the government and the thrifts. Unlike a typical government contract, the basis for the "contract" was many disparate documents which the government asserted were merely statements of existing policy and not a contractual undertaking. Disagreeing, Justice Souter approves of the lower court's determination that the documents which were incorporated into a final agreement composed a contractual commitment. The contractual commitment included an approval of the proposed merger, and an agreement to record "supervisory goodwill" as a capital asset to be amortized over a period of years.[255]

Justice Souter finds nothing in the documentation that purported to bar the government from making changes in the manner of regulating the industry in the future.[256] Instead, relying on principles of private contracts, the Court considers "this promise as the law of contracts has always treated promises to provide something beyond the promisor's absolute control, that is, as a promise to insure the promisee against loss arising from the promised condition's nonoccurrence."[257] Justice Souter finds this to be an implied promise to shift the risk of changes in the law—he never cites to

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panel and affirmed the Court of Federal Claims. Winstar Corp. v. United States, 64 F.3d 1531 (Fed. Cir. 1995)(*en banc*).

[255] 518 U.S. at 861-67.

[256] *Id.* at 868.

[257] *Id.* at 868-69.

specific language in the agreement.[258] This section of the opinion concludes that the passage of FIRREA constituted a breach of this implied promise.[259]

Justice Souter's conclusions concerning the nature of the contract are critical to his later reasoning in the opinion. By characterizing the contracts as risk-shifting agreements rather than promise not to change the law—Justice Souter avoids application of the "unmistakability doctrine" and the "sovereign acts doctrine."

Unmistakabilty doctrine

Justice Souter traces the origins of the unmistakability doctrine to the English common law concept that "one legislature may not bind the legislative authority of its successors."[260] This concept was limited in this country by the Contract Clause of the United States Constitution that barred states from passing laws that impair the obligations of contracts.[261] Early courts realized the Contracts Clause could become a serious threat to the sovereign responsibilities of states.[262] One solution was the development of the "reserved powers" doctrine that would forbid the contracting away of certain sovereign powers.[263] The second solution was the development of the "unmistakability doctrine" to strictly construe contracts purporting to barter away sovereign power. By 1862, the Supreme Court

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[258] *Id.*

[259] *Id.*

[260] *Id.* at 872 (*citing to* 1 W. Blackstone, Commentaries on the Laws of England 90 (1765)).

[261] U.S. CONST. art I, § 10, cl. 1.

[262] 518 U.S. at 874.

[263] *See* West River Bridge Co. v. Dix, 6 How. 507, 12 L.Ed. 535 (1848) (holding that a State's contracts do not surrender its eminent domain power).

formulated the "unmistakability doctrine" as the requirement that no sovereign power will be surrendered "unless such surrender has been expressed in terms too plain to be mistaken."[264]

The "unmistakability doctrine" was formulated to address problems with the Contracts Clause that prohibits states from passing laws that abrogate their contractual obligations.[265] However, the Contract Clause is not applicable to the federal government.[266] It was not until 1986, that the Supreme Court expanded the scope of the doctrine to include contractual relations between the federal government and contractors.[267] In *Bowen v. Public Agencies Opposed to Social Security Entrapment,* the Court dealt with a state-federal agreement regarding the right of a state to withdraw state employees from the social security scheme. In 1983, Congress changed the law eliminating the right to withdraw. The State of California and citizen groups filed suit. The Court applied the doctrine to federal contracts stating "contractual arrangements, including those to which the sovereign itself is a party, 'remain subject to subsequent legislation' by the sovereign."[268]

The Court reached a similar conclusion a year later in *United States v. Cherokee Nation of Okla.*[269] In that case, the Government had conveyed a property right in the Arkansas River to an Indian Tribe through a treaty. Subsequently, the government made navigation improvements that the tribe asserted damaged their property interests. The Indian Tribe sued the United States seeking just

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[264] *Winstar*, 518 U.S. at 875 (*citing to* Jefferson Branch Bank v. Skelly, 1 Black 436, 446, 17 L.Ed. 173 (1862)).

[265] The clause provides: "No state shall, without the Consent of Congress, . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. CONST. art I, § 10, cl. 1.

[266] Pension Benefit Guaranty Corporation v. R.A. Gray & Co., 467 U.S. 717, 732 n. 9 (1984).

[267] Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986).

[268] *Id.* at 52 (*quoting* Merion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982)).

[269] United States v. Cherokee Nation of Okla., 480 U.S. 700 (1987).

compensation. The Court held that the government's navigational easement was an element of sovereignty that could only be surrendered in "unmistakable terms."[270]

Justice Souter whittles these cases down to the simple holding that:

> a contract with a sovereign government will not be read to include an unstated term exempting the other contracting party from the application of a subsequent sovereign act (including an Act of Congress), nor will an ambiguous term of a grant or contract be construed as a conveyance or surrender of sovereign power.[271]

Justice Souter then makes a jump in logic to conclude that: "[t]he application of the doctrine thus turns on whether enforcement of the contractual obligation alleged would block the exercise of a sovereign power of the Government."[272] Justice Souter maintains that this is not remedy-based because "the particular remedy sought is not dispositive." According to him, there are cases where a claim for damages could in effect block the exercise of a sovereign power such as taxation—and the "unmistakability doctrine" would have to be satisfied. At the other extreme, "humdrum" supply contracts would never be subject to the "unmistakability doctrine." Provided that a contract is "reasonably construed to include a risk-shifting component that may be enforced without effectively barring the exercise of that power, the enforcement of the risk allocation raises nothing for the unmistakability doctrine to guard against, and there is no reason to apply it."[273]

Using this rationale, the "unmistakability doctrine" is inapplicable to the facts in *Winstar*. The "contracts" between the thrifts and the United States do not attempt to bind Congress from future changes in the law. Instead, Justice Souter reads the contracts "as solely risk-shifting agreements and

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[270] *Id.* at 707.

[271] *Winstar*, 518 U.S. at 878.

[272] *Id.* at 879.

[273] *Id.* at 879-80.

[the thrifts] seek nothing more than the benefit of promises by the Government to insure them against any losses arising from future regulatory change."[274] Thus, by creating the legal fiction of an implied agreement to indemnify, Justice Souter avoids application of the unmistakability doctrine to the present case.

Reserved Powers and Express Delegation

Using a similar type of reasoning, Justice Souter dispatches the next two government arguments. The "reserved powers doctrine" traces its history as a limitation placed on the Contracts Clause.[275] The doctrine is meant to prevent a state from contracting away an "essential attribute of its sovereignty."[276] The government argued the doctrine has a similar application to contracts by the federal government. Even so, Justice Souter once again points out that the contract in this case was for indemnification. "[A] contract to adjust the risk of subsequent legislative change does not strip the Government of its legislative sovereignty."[277]

A similar fate met the government argument that the Bank Board lacked the authority to "fetter the exercise of sovereign power."[278] Justice Souter agrees that the authority to contract away sovereign power must be clear and unmistakable. However, there was no such contract and the Court could avoid the issue.[279]

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[274] *Id.* at 881.

[275] *See* Stone v. Mississippi, 101 U.S. 814 (1880).

[276] *Winstar*, 518 U.S. at 888 (*quoting* United States Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 23 (1977).

[277] *Id.* at 889.

[278] *Id.* Justice Souter based his analysis on an earlier case *Home Telephone & Telegraph Co. v. Los Angeles*, 211 U.S. 265, 273 (1908).

[279] 518 U.S. at 890-91.

Sovereign Acts

Justice Souter goes to great lengths to analyze and then reject a "sovereign acts" defense that the government did not emphasize in their presentation to the Court.[280] He rejects the argument claiming that the "facts of this case do not warrant application of the doctrine, and even if that were otherwise the doctrine would not suffice to excuse liability under this governmental contract allocating risks of regulatory change in a highly regulated industry."[281] In making his argument, Justice Souter applies his analysis to all government contracts, refusing to distinguish between regulatory and non-regulatory contracts.[282] Further, he fails to explain any interaction between the sovereign act and unmistakability doctrines.

In formulating his view of the sovereign acts doctrine, Justice Souter relies upon the sole Supreme Court case addressing the issue. The Supreme Court had adopted the sovereign acts doctrine in *Horowitz v. United States.*[283] In that case, the Ordnance Department agreed to sell silk to a private contractor and to ship the material within a specified time. Another federal agency placed an embargo on the shipment of silk, substantially delaying the delivery. Meanwhile, the price of silk plummeted and the contract became unprofitable to the contractor. The contractor filed suit for damages and on appeal, the Supreme Court rejected the claim holding: "the United States when sued

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[280] The government devoted only three of their forty-six-page brief to the sovereign acts doctrine as compared to twenty pages applied to the unmistakability doctrine. Brief for the Petitioner at 43-46, United States v. Winstar Corp., 518 U.S. 839 (1996) (No. 95-865)(*available in* WESTLAW at 1996 WL 99716). *See also* Joshua I. Schwartz, *Assembling Winstar: Triumph Of The Ideal Of Congruence In Government Contracts Law?,* 26 PUB. CONT. L.J. 481, 515-16 (1997)(hereinafter Schwartz II).

[281] 518 U.S. at 891.

[282] *Id.* at 894.

[283] *Horowitz*, 267 U.S. 458.

as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its "public and general" acts as a sovereign."[284]

Justice Souter is mindful that the purpose behind the sovereign acts doctrine is to ensure the government is to be treated the same as a private contractor—the congruence principle.[285] He sets up a two-part test to apply the sovereign acts doctrine. First, one must determine whether the sovereign act is attributable to the government as a contractor. Second, if the answer is no, one should apply ordinary principles of private contract law—the impossibility doctrine.[286]

Applying the first prong requires a determination of the degree of governmental "self-interest" in the sovereign act.[287] *Horowitz's* "public and general" criteria are one method of ensuring the sovereign act is relatively free of self-interest. If the impact on a government contract is "incidental to the accomplishment of a broader governmental objective," ordinary private contract principles apply.[288] "The greater the Government's self-interest, however, the more suspect" the claim of the sovereign acts defense should be.[289] Justice Souter holds: "a governmental act will not be "public and general" if it has the substantial effect of releasing the Government from its contractual obligations."[290]

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[284] *Id.* at 461.

[285] 518 U.S. at 892-93.

[286] *Id.* at 896.

[287] Justice Souter defines governmental self-interest as instances where the government tries "to shift its legitimate public responsibilities to private parties." *Id.* at 896.

[288] *Id.* at 898.

[289] *Id.*

[290] *Id.* at 899.

The first prong only exempts the Government, under the prescribed circumstances, from the ordinary contracting principle that "a contracting party may not obtain discharge if its own act rendered performance impossible."[291] The second prong applies the common-law doctrine of impossibility that:

> [w]here, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.[292]

To assert the impossibility defense, the government would need to prove that the nonoccurrence of the change in the law was a basic assumption of the contract.[293] The law assumes the parties will have "bargained with respect to any risks that are both within their contemplation and central to the substance of the contract."[294] Absence of a provision gives rise to the inference that the risk was assumed by the government.[295]

Under the facts presented, Justice Souter does not find for the government under either prong of the test. FIRREA did not lack the "self-interest" necessary to find that it was "public and general." The act had the substantial effect of relieving the government of its obligations to the thrifts under the agreements. Justice Souter points to the legislative history where it was clear Congress expected the legislation to have a severe impact on agreements between the government and the thrifts. The fact

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[291] *Id.* at 904.

[292] RESTATEMENT (SECOND) OF CONTRACTS § 261.

[293] 518 U.S. at 905 (*citing* Restatement (Second) of Contracts § 261).

[294] *Id.*

[295] *Id.* (*citing* Lloyd v. Murphy, 25 Cal.2d 48, 54, 153 P.2d 47, 50 (1944)("[i]f [the risk] was foreseeable there should have been provision for it in the contract, and the absence of such a provision gives rise to the inference that the risk was assumed.").

that the purpose of FIRREA was "to advance the general welfare" did not lessen the impact on the government's contractual obligations. Therefore, Justice Souter would not allow the government to be relieved of its obligations under the sovereign acts defense.[296]

Nonetheless, Justice Souter applies the second prong assuming for the purpose that FIRREA qualified as a "public and general" act. However, he also finds that the impossibility defense is not available to the government. The very existence of the contract for regulatory treatment between the government and the thrifts argues against any assumption by the parties that the rules would not change. In addition, Justice Souter had already found the contract included an implied agreement to indemnify the thrifts. Language or circumstances that allocate the risk of a change to the party seeking discharge also negates the impossibility defense.[297]

For the reasons stated above, Justice Souter, joined by Justices Stevens and Breyer, and in part by Justice O'Connor found for the thrifts. No part of the decision was joined by a majority of the Court and the reasoning in the concurring opinions differed substantially—creating doubt as to the validity of rationale.

Concurrence of Justice Breyer: Unmistakability, Who Needs It?

Justice Breyer, although concurring with Justice Souter's plurality opinion, wrote separately to address a different view of the unmistakability doctrine. Justice Breyer is unwilling to legitimize "unmistakability" by even referring to it as a doctrine, instead it is merely "unmistakability" language contained in a few distinguishable cases.[298] Justice Breyer sharply rejects the government and dissent's notion that the unmistakability doctrine is an incantation that "normally shields the

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[296] *Id.* at 903-04.

[297] *Id.* at 905-10.

[298] *Id.* at 910-19 (Breyer, J., concurring).

Government from contract liability where a change in the law prevents it from carrying out its side of the bargain."[299] A firm believer in congruence principles, Justice Breyer acknowledges that the language might have been appropriate in the few cases where applied by the Supreme Court. However, it was "not intended to displace the rules of contract interpretation applicable to the Government as well as private contractors in numerous ordinary cases, and in certain unusual cases, such as this one."[300]

The government as contractor should be "governed generally by the law applicable to contracts between private individuals."[301] Justice Breyer argues that the congruence principle makes sense on policy grounds. "[I]n practical terms it ensures that the government is able to obtain needed goods and services from parties who might otherwise, quite rightly, be unwilling to undertake the risk of government contracting."[302] Justice Breyer makes only small concessions to the exceptionalism theory that the government should be treated differently:

> This is not to say that the government is always treated just like a private party. The simple fact that it is the government may well change the underlying circumstances, leading to a different inference as to the parties' likely intent—say, making it far less likely that they intend to make a promise that will oblige the government to hold private parties harmless in the event of a change in the law. But to say this is to apply, not to disregard, the ordinary rule of contract law.[303]

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[299] *Id.* at 910.

[300] *Id.* at 911.

[301] Lynch v. United States, 292 U.S. 571, 579 (1934). Justice Breyer also cites the following cases as precedent for application of congruence principles to government contracts. *See* Perry v. United States, 294 U.S. 330, 352 (1935); Sinking Fund Cases, 99 U.S. 700, 719 (1879) ("The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen").

[302] 518 U.S. at 913 (Breyer, J., concurring).

Justice Breyer finds additional support for his congruence views in the Tucker Act, which allows suits for damages against the United States based on "any claim ... founded ... upon any express or implied contract."[304] In the past the Supreme Court has allowed such suits based on implied-in-fact contracts ""founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding."[305] According to Justice Breyer, this evinces an intent by Congress to allows suits based on promises that are far from unmistakable—and lends support to the theory the government should be treated the same as a private party.[306]

Justice Breyer finds two bases for rejecting application of the unmistakability language. First, the three cases where the Supreme Court used language referring to unmistakability should not be read as imposing a requirement of clear language before surrendering sovereign power. Justice Breyer determines that the outcome of these cases did not rest on application of the unmistakability language contained in the decision. In two of the cases, Justice Breyer concludes there was no evidence of any type of promise not to change the law in the first place.[307] In the third case, there was

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[303] *Id.*

[304] Tucker Act, 28 U.S.C. § 1491(a)(1).

[305] 518 U.S. at 914 (Breyer, J., concurring)(*quoting* Baltimore & Ohio R. Co. v. United States, 261 U.S. 592, 597 (1923)).

[306] *Id.*

[307] *See* Merion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); United States v. Cherokee Nation of Okla., 480 U.S. 700 (1987). *Merion* involved leases by an Indian Tribe to private parties to extract oil and gas. The private parties maintained the leases contained an implicit waiver not to impose a tax. The Court found the lease was silent on the issue and was not willing to infer a waiver from silence. 455 U.S. at 148. *Cherokee* involved interpretation of a treaty that was likewise silent as to whether sovereign rights had been contracted away. 480 U.S. at 706-07.

statutory language where Congress reserved the right to alter or amend the law.[308] The facts of those cases did not warrant extension of this language into a doctrine of contract interpretation.

The second reason for limiting application of the "unmistakability" language is the nature of the promises in the earlier cases. In those cases, the claim was that the government has promised not to "legislate, or otherwise exercise its sovereign powers."[309] This is far different from ordinary contracts, or even unusual cases such as in *Winstar.* These contracts only promise to hold a party harmless for changes in the law—changes that the government is free to make.[310] Justice Breyer dismisses the government argument that financial liability might deter future legislation and therefore warrants application of an unmistakability doctrine. Application of a different rule of contract interpretation based on "the amount of money at stake, and therefore (in the Government's terms) the degree to which future exercises of sovereign authority may be deterred, seems unsatisfactory."[311]

In sum, Justice Breyer finds that the unmistakability language found in those earlier decisions might reflect the "unique features of sovereignty" present. He concludes, however, that the language was not "meant to establish an 'unmistakability' rule that controls more ordinary contracts, or that controls the outcome here."[312] As applied to *Winstar*, these agreements contained promises to hold

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[308] *Bowen* discussed *supra* note 267 contained a congressional statute that reserved the right to "alter, amend, or repeal" any provision. *Bowen,* 477 U.S. at 55.

[309] 518 U.S. at 916 (Breyer, J., concurring).

[310] *Id.* at 916-17.

[311] *Id.* at 917.

[312] *Id.* at 918.

the thrifts harmless inferred from the contractual language. "[T]here is no special policy reason related to sovereignty which would justify applying an 'unmistakability' principle here."[313]

Concurrence of Justice Scalia—Unmistakability, Reversing the Presumption

Justice Scalia, joined by Justices Thomas and Kennedy, concurs in the judgment. However, they offer a substantially different rationale for their decision. In a brief opinion, spanning less than five pages of the reporter, Justice Scalia defines the unmistakability doctrine in a new way and subsequently rejected the sovereign acts doctrine as adding nothing to the law.

Justice Scalia begins by taking issue with the plurality's characterization of the contractual agreements between the United States and the thrifts. By characterizing the contracts as "risk-shifting agreements" the plurality contends that the contracts did not "constrain the exercise of sovereign power, but only [made] the exercise of that power an event resulting in liability for the Government."[314] Justice Scalia finds this ploy to avoid application of sovereign defenses without merit. This approach "has no basis in our cases, which have not made the availability of these sovereign defenses (as opposed to their validity on the merits) depend upon the nature of the contract at issue."[315] Even more, this method of contractual interpretation is invalid: "Virtually every contract operates, not as a guarantee of particular future conduct, but as an assumption of liability in the event of nonperformance: 'The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else.'"[316]

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[313] *Id.*

[314] *Id.* at 919 (Scalia, J., concurring).

[315] *Id.*

[316] *Id.* (*quoting* Holmes, The Path of the Law (1897), in 3 The Collected Works of Justice Holmes 391, 394 (S. Novick ed.1995)).

Additionally, Justice Scalia criticizes the plurality opinion for finding the unmistakability doctrine was not applicable to the facts presented in the case. "The "unmistakability" doctrine has been applied to precisely this sort of situation—where a sovereign act is claimed to deprive a party of the benefits of a prior bargain with the government."[317] However, unlike the dissent, Justice Scalia does not find that application of the unmistakability doctrine precludes the thrifts' claim.

While professing a philosophy of congruence, Justice Scalia is forced to recognize the exceptional nature of government contracts. Applying congruence principles, he argues that the unmistakability doctrine does little beyond "normal principles of contract interpretation."[318] "Generally, contract law imposes upon a party to a contract liability for any impossibility of performance that is attributable to that party's own action."[319] In almost the same breath, he recognizes the exceptionalist idea that the government-as-contractor is different. "Governments do not ordinarily agree to curtail their sovereign or legislative powers, and contracts must be interpreted in a commonsense way against that background understanding."[320] Therefore, the unmistakability doctrine creates a reverse presumption that the government has not agreed to contract away its sovereign authority.

When the subject matter of a contract involves an agreement to regulate in a particular manner, Justice Scalia would not require a further second promise not to renege on that promise. According to Justice Scalia, the dissent argument that the government only agrees to certain regulation unless it is subsequently changed is absurd. Such an argument "is an absolutely classic

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[317] *Id.* at 920.

[318] *Id.*

[319] *Id.*

[320] *Id.* at 921.

description of an illusory promise." Therefore, Justice Scalia concludes that the agreement between the thrifts and the government constituted an "unmistakable" promise that satisfies the requirements of the law.[321]

In a single paragraph, Justice Scalia dismisses the government arguments based on "reserved powers" and "express delegation." Neither of these principles is well defined by Supreme Court jurisprudence. Justice Scalia finds the "reserved powers" notion inapplicable to contracts setting out commercial risks.[322] Instead the "reserved powers" are "the federal police power or some other paramount power."[323] Whatever is required by the "express delegation" concept was satisfied by the regulations allowing the Bank Board to enter these types of contracts.

Justice Scalia expresses little use for the sovereign acts doctrine:

> In my view the "sovereign acts" doctrine adds little, if anything at all, to the "unmistakability" doctrine, and is avoided whenever that one would be-- i.e., whenever it is clear from the contract in question that the Government was committing itself not to rely upon its sovereign acts in asserting (or defending against) the doctrine of impossibility, which is another way of saying that the Government had assumed the risk of a change in its laws.[324]

This summary rejection is less surprising when one realizes that Justice Scalia's explanation of the unmistakability doctrine is based on the same principles that the plurality and dissent use to describe the sovereign acts doctrine.[325]

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[321] *Id.*

[322] *Id.*

[323] *Id.* at 923 (*quoting* Lynch v. United States, 292 U.S. 571, 579 (1934).

[324] *Id.* at 923-24.

[325] *See* Schwartz II, *supra* note 280 at 543-44.

Rehnquist's Dissent—Saving Unmistakability and Sovereign Acts

In a dissenting opinion, Chief Justice Rehnquist expresses concern that the plurality has announced sweeping and untenable changes to the unmistakability doctrine and virtually eliminated the sovereign acts doctrines. Justice Ginsburg joins in the Chief Justice's dissent except with respect to his argument concerning the sovereign acts doctrine.

The dissent argues that the primary opinion effects drastic changes in the unmistakability doctrine "shrouding the residue with clouds of uncertainty."[326] Both the dissent and plurality agree "that the unmistakability doctrine is a 'special rule' of government contracting which provides, in essence, a 'canon of contract construction that surrenders of sovereign authority must appear in unmistakable terms.'"[327] The Chief Justice's primary disagreement with the plurality opinion concerns Justice Souter's framework for applying the doctrine. Practically speaking, there is no way to determine whether an award of damages would amount to an exemption or block to sovereign authority before an assessment of liability. In other words, the test requires an assessment of damages before liability is established. The Chief Justice remarks that if this were permitted, any plaintiff could avoid the defense "by claiming the Government had agreed to assume the risk, and asking for an award of damages for breaching that implied agreement."[328]

Additionally, Chief Justice Rehnquist does not buy the plurality's justifications for departing from the precedent set out in earlier cases. The plurality opinion argues that *Winstar* contracts, unlike the earlier precedents "do not purport to bind Congress from enacting regulatory measures"—and hence, the unmistakability doctrine should not be applied. The Chief Justice points out that the very

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[326] 518 U.S. at 924 (Rehnquist, C.J., dissenting).

[327] *Id.*

[328] *Id.* at 927.

purpose of a canon of construction is to determine whether the contract impermissibly binds Congress—and therefore it would have to be applied first. The Chief Justice remarks: "if a canon of construction cannot come into play until the contract has first been interpreted as to liability by an appellate court, and remanded for computation of damages, it is no canon of construction at all."[329]

Likewise, the dissent does not believe that the unmistakability doctrine has impaired the government's ability to enter contracts. For decades, the law has prevented Congress from changing the law to avoid contractual obligations without paying damages. On the flip side, the law has also recognized that the government does not "shed its sovereign powers because it contracts." To date, the dissent observes there has not been a "diminution in bidders" that would require such a drastic change in the law.[330]

The dissent also criticizes the plurality for changes to "the existing sovereign acts doctrine which render the doctrine a shell." Chief Justice Rehnquist asserts that Justice Souter has mischaracterized the long history of the doctrine that has emphasized the dual roles of the government as contractor and sovereign. "By minimizing the role of lawgiver and expanding the role as private contractor, the principal opinion has thus casually, but improperly, reworked the sovereign acts doctrine."[331] The dissent disagrees that the basic premise of *Horowitz* is "to put the Government in the same position it would have enjoyed as a private contractor." The dissent would emphasize the holding from *Deming* that "[t]he United States as a contractor are not responsible for the United States as lawgiver."[332]

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[329] *Id.* at 930-31.

[330] *Id.* at 929.

[331] *Id.* at 931.

[332] *Id.* (*quoting* 1 Ct.Cl. at 191).

The dissent is equally critical of the pluralities new characterization of the "public and general" requirement as depending on governmental motive for enacting a change to the law. Accordingly, the requirement of determining whether a sovereign act is "self-interested" is unworkable. The Chief Justice is particularly disturbed by the plurality's use of the comments of individual legislators to determine whether an act is "self-relief."[333] Instead, the dissent would leave the law as it is. Under *Lynch*, specific legislation aimed at avoiding payment of a contract is a breach. "But, as the term 'public and general' implies, a more general regulatory enactment…cannot by its enforcement give rise to contractual liability on the part of the Government."[334] Using this standard, the dissent would find FIRREA to be "public and general" and would allow the government to assert the sovereign act doctrine as a defense.

Justice Scalia's concurrence is also singled out for criticism. The dissent takes exception to Justice Scalia's finding of an implicit obligation not to frustrate the contract through subsequent sovereign acts. Such an "implicit" promise does not comport with the dissent's view of "unmistakable terms." The Chief Justice likewise is critical of Justice Scalia's failure to make findings necessary to support his decision. Justice Scalia errs by relying on the findings of lower courts that ruled the unmistakability doctrine does not apply.[335]

The Chief Justice concludes by critiquing Justice Breyer for finding an "unmistakable" promise to pay the thrifts in the event that the regulatory scheme changed. Justice Breyer does not make findings of fact himself but relies on the "principal opinion's careful examination of the

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[333] *Id.* at 933-34.

[334] *Id.*

[335] *Id.* at 935-36.

circumstances." The dissent argues that Justice Breyer errs by making an "illusory factual finding" not supported in the record. [336]

According to Chief Justice Rehnquist, none of the other opinions can reach their desired result "without changing the status of the Government to just another contractor under the laws of contracts." This does not comport with the dissent's strongly exceptionalist view that "[m]en must turn square corners when they deal with the government." This view is based on "the necessity of protecting the federal fisc—and the taxpayers who foot the bills—from possible improvidence on the part of the countless Government officials who must be authorized to enter into contracts for the Government."[337]

Distilling Winstar—What's left?

Weaknesses

The Court in *Winstar* leaves future courts and practitioners in serious doubt as to the state of law. Very few of the principles stated by the plurality command the support of a majority of the justices. There are certain common areas, however, that both other members of the Court and outside commentators soundly and justifiably criticize.

One question unanswered by the Court is why the documents in this case constitute a contract as opposed to a consent agreement. Historically, regulatory agreements have been analyzed under the Takings Clause rather than using principles of government contract law.[338] By finding a contractual agreement, the Court in *Winstar* then is forced to apply principles that might not be appropriate.

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[336] *Id.* at 936-37,

[337] *Id.* at 937.

[338] Alan R. Burch, Purchasing the Right to Govern: Winstar and the Need to Reconceptualize the Law of Regulatory Agreements, 88 KY. L.J. 245, 373-75 (Winter 1999-2000).

After accepting as given the existence of a contract, Justice Souter's use of a "recharacterization" device to avoid application of the sovereign defenses is difficult to justify except as a ploy to reach a desired outcome. Justice Souter reads an implied promise not to change the regulatory scheme into the agreements between the thrifts and government.[339] One of the few points agreed upon by the majority of the Court is the fallacy of this approach. All agree that the unmistakability doctrine is a "canon of construction." Black's Law Dictionary defines canons of construction as "[t]he system of fundamental rules and maxims which are recognized as governing the construction or interpretation of written instruments."[340] In other words, the unmistakability doctrine should be used to determine whether there is in fact an enforceable contract between the government and a private party.

Contrary to common sense, the plurality finds an enforceable contract before they decide to apply the unmistakability doctrine. Justice Souter invokes Holmes' theory that "promises to provide something beyond the promisor's absolute control…[is] a promise to insure the promisee against loss arising from the promised condition's nonoccurrence."[341] Applying this logic, Justice Souter avoids the application of the unmistakability doctrine because a promise to insure or indemnify, he argues, does not ordinarily implicate issues of sovereignty.[342] Using this same logic, almost any contract could be viewed in the same manner and the doctrine would be virtually worthless.

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[339] See Michael P. Malloy, When You Wish Upon Winstar: Contract Analysis and the Future of Regulatory Action, 42 ST. LOUIS L.J. 409, 440 (1998)("("There is more than a little obfuscation in this recharacterization.").

[340] Blacks's Law Dictionary 142 (6th ed. 1990).

[341] 518 U.S. at 868-69 (Souter, J.).

[342] *Id.* at 920 (Scalia, J., concurring); *See* Gillian Hadfield, *Of Sovereignty and Contract: Damages for Breach of Contract by Government,* 8 S. CAL. INTERDIS. L.J. 467, 485 (1999).

While the plurality may have used this technique to sidestep application of the unmistakability doctrine, they ignore the minefield they may have entered. During the same term as *Winstar*, the Supreme Court examined these issues in the *Hercules* decision discussed in Section I of this thesis.[343] Broad agreements to indemnify or insure ordinarily run afoul of the Anti-Deficiency Act which prevents government officials from spending money that Congress has not appropriated or allocated for that contract.[344] Government officials that enter such agreements without specific authority would be acting *ultra vires* rendering the agreement void. As the *Hercules* court asserts, "[t]here is also reason to think that a contracting officer would not agree to the open-ended indemnification...."[345] Therefore, it may not be reasonable for the court to find an "implied" agreement to insure or indemnify to begin with. The better rule is to step back and apply the unmistakability doctrine as intended—as a rule of construction.

Equally faulty is the plurality's application of an untenable "remedy-based" test to determine application of the unmistakability doctrine.[346] Justice Scalia criticizes this approach in part because it is without precedent.[347] However, more problematic is the application of the rule. When does an agreement to pay damages effectively limit sovereign authority? The answer does not appear to be

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[343] *See supra* notes 57-83 and accompanying text.

[344] Burch, *supra* note 338 at 312-13.

[345] 516 U.S. at 426-28 .

[346] See Michael W. Graf, The Determination of Property Rights in Public Contracts After Winstar v. United States: Where has the Supreme Court Left Us?, 38 NAT. RESOURCES J. 197, 226-234 (1998).

[347] 518 U.S. at 919 (Scalia, J., concurring).

the amount of damages sought. The *Winstar* cases, and similar agreements with other thrifts, involved potential liability of extraordinary sums of money.[348]

Another problem is the failure of any of the opinions to explain the interaction and relation between the sovereign acts and unmistakability doctrines. The doctrines, although similar, have different genesis. The sovereign acts doctrine has a long history as applied to federal contracts. The United States Claims Court and its predecessors have addressed it numerous times since the court's inception in the mid-1800's. The doctrine has traditionally been applied to contracts made by the government in its private capacity as contractor.[349] The unmistakability doctrine traces its history to English common law concerning the power of one legislature to bind the next. In our country, it was developed in the context of the Contract Clause. The doctrine has only been applied to federal contracts for less than two decades—and in only a couple cases.[350]

The dissent at least recognizes that the doctrines are "not entirely separate principles"—but offers no further explanation.[351] Justice Scalia would do away with the sovereign acts doctrine, since he believes it adds nothing. However, his reformulation of the unmistakability doctrine seems to be

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[348] One commentator suggests the price in these cases approached $30 billion, Burch, *supra* note 338, at 420.

[349] *See* Burch, *supra* note 338, at 379.

[350] Justice Scalia criticizes the "so-called" sovereign acts doctrine because it has only been applied by the Supreme Court in a single case, *Horowitz.* 518 U.S. at 923. He never acknowledges the long history as applied to federal contracts within the specialized United States Claims Court and its successors. *See, e.g., Deming*, 1 Ct.Cl. at 190; *Jones,* 1 Ct.Cl. 383; Sunswick Corp. v. United States, 109 Ct.Cl. 772 (1948). The use of the unmistakability doctrine is more susceptible to this criticism. It has only been applied to federal contractual agreements in a single case, *Bowen.* 477 U.S. 41. The other two cases mentioned involved a contract between an Indian tribe and a private party, *Merion,* and a treaty with an Indian tribe, *Cherokee. See* 455 U.S. 130; 480 U.S. 700.

[351] 518 U.S. at 937 (Rehnquist, C.J., dissenting).

derived in large part on the sovereign acts doctrine.[352] With *Winstar* as a precedent, courts today cannot say with any degree of confidence which doctrine applies and in what situations.

The *Winstar* decision has also been criticized for failing to distinguish between agreements the government enters as a regulator and others it enters into as a market-participant. More than one commentator has suggested that this distinction should be used to clarify application of the sovereign acts doctrine and the unmistakability doctrine.[353] One suggestion is that the unmistakability doctrine should not be applied to agreements with the government-as-contractor—leaving only application of the sovereign acts doctrine.[354] For regulatory, or government-as-sovereign agreements both doctrines would be applied, although the sovereign acts doctrine would add little.[355]

Areas of Agreement

In spite of internal discord and external criticism, some guiding principles find support among a majority of the justices and survive *Winstar.* One area of agreement among a majority of the justices is a condemnation of Justice Souter's "recharacterization" of the government's agreements into promises to compensate in the event of a regulatory change. The concurring opinion of Justice Scalia, joined by Justices Thomas and Kennedy as well as the dissent of Chief Justice Rehnquist, joined by Justice Ginsburg all reject this device.

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[352] Schwartz II, *supra* note 280, at 554-55.

[353] *See, e.g.,* Graf, *supra* note 346, at 255-56; Burch, *supra* note 338, at 386-87; Malloy, *supra* note 339, at 446 ("The opinion refused to accept a simple dichotomy between 'regulatory' and 'nonregulatory' capacities.").

[354] Graf, *supra* note 346, at 255.

[355] *Id.*

One commentator has suggested "one would not go far astray in simply considering [the plurality opinion to be] the majority opinion."[356] Of the four defenses raised by the government, "unmistakability," "reserved powers," "express delegation," and "sovereign acts," the three majority opinions diverge significantly only on the "unmistakability" doctrine.[357] A majority of the justices would apply an "unmistakability doctrine" but only the two-member dissent leave any teeth in that doctrine.

Another view, suggested by Professor Schwartz, would ignore labels such as "unmistakability" or "sovereign acts" and instead look at the underlying principles in order to find agreement:

> [T]he key element of an approach likely to command majority support is a rebuttable presumption that by entering a contract the Government does not promise to curtail the exercise of its sovereign power that could affect contractual performance. The strength of this presumption and the kind of evidence necessary to rebut it is primarily a function of the level of generality of the governmental action that interferes with the promised performance. Careful attention to the particular undertaking involved and the surrounding circumstances is required in determining whether the risk of a change in regulatory regime has been assigned to the Government. The allocation of this risk cannot be determined simply by automatically recharacterizing a governmental promise that literally concerns the regulatory treatment to be afforded a contractor into a promise of indemnity in the event of regulatory change.[358]

Without an adequate framework, courts since 1996 have been forced to assess agreements between the United States and their contracting partners. The aftermath will include confusion and

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[356] *Id.*

[357] Burch, *supra* note 338, at 372-73.

[358] Schwartz, *supra* note 280, at 556.

litigation as courts are forced to reassess the doctrines "clarified" by the United States Supreme Court.[359]

Winstar Creeps into the Environmental Field—Yankee Atomic Electric Company v. United States

Less than one year after the Supreme Court rendered the decision in *Winstar,* the Court of Appeals for the Federal Circuit took up a case addressing similar issues.[360] The court reversed a decision by the Court of Federal Claims applying the sovereign acts and unmistakability doctrines to a contract between the Department of Energy and a nuclear energy plant.[361] The *Yankee* decision applies the teachings of *Winstar* to more traditional government contracts in a non-regulatory field. In addition, it expands the sovereign acts and unmistakability doctrines to contracts that may be considered fully performed before a change in the law frustrated the contractor's expectations. The decision reveals the difficulty in applying the splintered *Winstar* holdings to subsequent cases. The case is also illustrative of how the Court of Federal Claims and the Federal Circuit will apply the sovereign acts and unmistakability doctrines to future claims.

Yankee Atomic and the Energy Policy Act

Yankee Atomic Electric Company (Yankee Atomic) located in Rowe, Massachusetts was formed in 1954 by a variety of utilities who banded together to produce nuclear-generated

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[359] *See* Malloy, *supra* note 339, at 450 ("What is both extraordinary and unfortunate, however, is the absolute lack of guidance with which the *Winstar* decision leaves us.').

[360] *Yankee*, 112 F.3d 1569. In the environmental field, most of the commentary has been on the application of *Winstar* principles to habitat conservation plant contracts under the Endangered Species Act. *See, e.g.,* Amy C. Derry, *No Surprises After Winstar: Contractual Certainity and Habitat Conservation Planning Under the Endangered Species Act,* Note, VA. ENVTL. L.J. 357 (1998); Jean O. Melious & Robert D. Thornton, *Contractual Ecosystem Management Under the Endangered Species Act: Can Federal Agencies Make Enforceable Commitments?* 26 ECOLOGY L.Q. 489 (1999).

[361] *See* Yankee Atomic Electric Co. v. United States, 33 Fed. Cl. 580 (1995).

electricity.[362] From 1963 until its closure in 1992, Yankee Atomic entered into a series of fixed-price contracts with the United States for the purchase of enriched uranium to be used as fuel for the nuclear reactor.[363] In the late 1980's, Congress realized that the agencies selling the nuclear fuel had failed to price the material at a high enough rate to pay for the clean up of the radioactive waste as the government processing plants aged and were decommissioned.[364] In response, Congress passed the comprehensive Energy Policy Act of 1992 to address many concerns—including the cleanup of these sites.[365]

The Energy Policy Act created the Uranium Enrichment Decontamination and Decommissioning Fund to finance the cleanup of the government-owned enrichment plants. The funds were to be raised in part with public funds and in part by a special assessment of domestic utilities. The special assessment was divided among utilities based on the number of DOE produced uranium enrichment units a particular utility actually used. If a utility purchased a DOE enrichment unit and sold it to another utility it did not count. By the same token, if they purchased a DOE enrichment unit from another utility, it was counted in assessing the using utility's pro-rata share of the assessment.[366]

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[362] 33 Fed. Cl. at 582.

[363] 112 F.3d. 1572.

[364] H.R. REP. NO. 474, 102d Cong., 2d Sess., pt. I, at 142, 144; pt. VIII, at 76, 78 (1992), reprinted in 1992 U.S.C.C.A.N. 1965, 1967, 2294, 2296.

[365] Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776.

[366] 112 F.3d at 1572.

Yankee Atomic was assessed $3 million even though they had shut down prior to passage of the Act.[367] The company filed suit in the Court of Federal Claims to recover these funds. The Court of Federal Claims ruled in favor of Yankee Atomic. Applying the sovereign acts doctrine the court determined: "The doctrine of 'public and general' 'sovereign acts', laid down in [Horowitz] does not relieve the Government from liability where it has specially undertaken to perform the very act from which it later seeks to be excused."[368] In other words, the court believed the Energy Policy Act was targeted to avoid a government contract. On appeal, the Federal Circuit disagreed.

Federal Circuit Applies Winstar

As in *Winstar,* the characterization of the agreement was dispositive to the outcome of the case. Both Yankee Atomic and the Federal Court of Claims viewed the special assessment as a retroactive price increase to the earlier contracts between the United States and the contractor.[369] The government viewed the special assessment as unrelated to the earlier contracts and instead as an exercise of the sovereign taxing authority.[370] To sort through the issues the Federal Circuit applied the sovereign acts and unmistakability doctrines in sequence.

Sovereign Acts Doctrine

The Federal Circuit appears to adopt the *Winstar* plurality's version of the sovereign doctrine act but applies it only in part. In assessing the dual natures of the government, the court states: "The Government-as-contractor cannot exercise the power of its twin, the Government-as-sovereign, for the purpose of altering, modifying, obstructing or violating the particular contracts into which it had

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[367] *Id.* at 1573.

[368] 33 Fed. Cl. at 585 (*quoting* Freedman v. United States, 320 F.2d 359, 366 (Ct. Cl. 1963)).

[369] 112 F.3d at 1573.

[370] *Id.*

entered with private parties. Such action would give the Government-as-contractor powers that private contracting parties lack."[371] On the other hand, the "Government-as-sovereign must remain free to exercise its powers."[372] The Federal Circuit reasons the sovereign acts doctrine is employed to balance the roles. The sovereign acts doctrine "is not a hard and fast rule, but rather a case-specific inquiry that focuses on the scope of the legislation in an effort to determine whether, on balance, that legislation was designed to target prior governmental contracts."[373] Application of the doctrine entails determining whether the government acted with the purpose of benefiting the Government-as-contractor, or whether the legislation was passed for the public benefit.[374]

The Federal Circuit turns a blind eye to the *Winstar* plurality's analysis of the sovereign acts doctrine as an examination of the degree of the government's self interest. Noticeably missing is an application of the plurality's observation that: "[W]hen we speak of governmental "self-interest," we simply mean to identify instances in which the Government seeks to shift the costs of meeting its legitimate public responsibilities to private parties."[375] Missing also is consideration of the plurality's "holding that a governmental act will not be "public and general" if it has the substantial effect of releasing the Government from its contractual obligations."[376] Further, the Federal Circuit fails to complete the analysis. The *Winstar* plurality determined that if the sovereign act is "public and general," "the Government's defense to liability depends on the answer to the further question,

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[371] *Id.* at 1575.

[372] *Id.*

[373] *Id.*

[374] *Id.*

[375] 518 U.S. at 896.

[376] *Id.* at 899.

whether that act would otherwise release the Government from liability under ordinary principles of contract law."[377]

Even with the truncated analysis, it is difficult to see how the Federal Circuit differentiates the Energy Policy Act from FIRREA in terms of the amount of governmental 'self-interest' involved. Both acts involved sweeping changes to their respective fields and only small portions of each directly affected contractual agreements with the government. However, both acts had severe economic consequences for private parties that were current or former contracting parties with the United States.

The Federal Circuit avoids this difficulty by not making any comparison at all. Instead, they focus exclusively on the Energy Policy Act and faults Yankee Atomic for focusing on the aspects of the act that affect them directly. The court asserts the purpose of the Energy Policy Act was to spread the cost of a problem they only realized after making the contract. The Federal Circuit makes much of the fact that utilities not involved directly in contracts with the United States had to pay based on the amount of DOE manufactured enriched uranium they purchased on the secondary market. This emphasis is difficult to reconcile with *Winstar*. Thrifts that were not involved in agreements with the Bank Board were also affected by the changes in capital requirements under FIRREA. FIRREA also purported to be enacted to protect the public and was a "mammoth" legislation only parts of which involved the agreements at issue in *Winstar*.

Nonetheless, the Federal Circuit finds the Energy Policy Act to be "public and general" and therefore the sovereign acts defense was applicable. Instead of completing the *Winstar* plurality's sovereign acts analysis concerning whether the contracts had allocated the risk, the court immediately steps to the unmistakability doctrine.

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[377] *Id.* at 896.

Unmistakability Doctrine

The Federal Circuit carefully steps through the *Winstar* unmistakability thicket by trying to analyze the facts in a manner inoffensive to each of the opinions. The Federal Circuit believes that the Supreme Court justices were consistent in the formulation of the doctrine that:

> [A] contract with a sovereign government will not be read to include an unstated term exempting the other contracting party from the application of a subsequent sovereign act (including an act of Congress), nor will an ambiguous term of a grant or contract be construed as a conveyance or surrender of sovereign power.[378]

The court acknowledges that the problem is not in articulation of the doctrine, but rather in deciding under what circumstances it applies. The Federal Circuit notes that the plurality found application of the doctrine depended on the nature of the contractual agreement. At the same time, the Federal Circuit observes that five other Supreme Court justices disagreed with this reasoning. The Federal Circuit reacted by applying both tests.

The Federal Circuit observes the contracts between DOE and Yankee Atomic could be easily characterized as risk-shifting agreements.[379] The agreements at issue are fixed-price contracts. As the Supreme Court has held "[w]here one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered."[380] Before venturing too far down this trail, the Federal Circuit notes that "the plurality also expressly stated that application of the unmistakability doctrine turns on whether enforcement of the contractual obligation would effectively block the exercise of a sovereign power

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[378] 112 F.3d at 1578 (*quoting Winstar,* 518 U.S. at 878).

[379] *Id.* at 1579.

[380] United States v. Spearin, 248 U.S. 132, 136 (1918); *See also* ITT Arctic Servs., Inc. v. United States, 524 F.2d 680, 691 (Ct. Cl. 1975)(that "the [seller] in a fixed-price contract assumes the risk of

of the Government."[381] The opinion argues that the damages Yankee Atomic is seeking would in effect be a tax rebate that the plurality "seemed to recognize as a block to the exercise of sovereign power."[382] Using that rationale, the Federal Circuit applies the unmistakability doctrine.

According to the court, next comes an analysis of whether the contracts between Yankee Atomic and the government contained an unmistakable promise not to impose a general assessment against all utilities that benefited from DOE's enrichment services.[383] This characterization of the issue is of paramount importance because Yankee Atomic argued that the fixed-price nature of the contract is an unmistakable promise forbidding a future price increase. By requiring that the "unmistakable promise" be in such precise terms, the court, of course, finds no such promise. The Federal Circuit determined that the contract was fully performed when the government provided the enriched uranium and the contractors paid the negotiated price.[384] Yankee Atomic did have a vested contract right, but the subsequent legislation was unrelated to any attempt to retroactively increase the price.[385]

Thus, the Federal Circuit finds for the United States because the passage of the Energy Policy Act was a "public and general" sovereign act and the contractual agreements did not contain unmistakable promises that would preclude the government from exercising that sovereign power.

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unexpected costs. In firm fixed-price contracts, risks fall on the [seller], and the [seller] takes account of this through his prices.").

[381] 112 F.3d at 1579.

[382] *Id.*

[383] *Id.* at 1580.

[384] *Id.*

[385] It is important to analysis of the CERCLA issue to note that the Federal Circuit seems to indicate it would apply the same analysis whether the issue is an ongoing contractual relationship or a vested contract right. *See* 112 F.3d. at 1580, 1582.

While the *Yankee* decision can be viewed as an expansion of *Winstar* principles into a non-regulatory setting and to include completed contracts, the Federal Circuit's application of the principles is quite restricted.[386] Less certain will be future cases where the application of the unmistakability doctrine cannot be reconciled with the competing *Winstar* opinions.

The Dissent—Breach?

The dissent begins by noting a problem virtually ignored by the majority opinion.[387] These contracts were fully and satisfactorily performed. Therefore, Yankee Atomic cannot make a claim that the government breached the contract. However, the completed contract does create a vested property right protected by the Takings Clause of the Fifth Amendment.[388] "The Fifth Amendment prohibits the federal government from depriving a person of property 'without due process of law'

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[386] While the *Yankee* court applied the *Winstar* analysis of the unmistakability and sovereign acts doctrines to completed contracts in a non-regulatory setting, some commentators view the decision as a reversal in direction, giving the government a free hand to repudiate contracts. *See* Deneen J Melander & Nancy R. Wagner, *Winstar and Yankee Atomic: The Government's Power to Retroactively Alter Contracts,* 28 NAT'L CONTRACT MANAGEMENT J. 1 (1997).

[387] However, the majority does note:

> Throughout its briefs, Yankee Atomic contends that the special assessment constitutes a breach of its contracts with the Government. Technically, however, this does not appear to be a case involving a breach of contract. Typically, a contract breach occurs while the contract is being performed, whereas the contracts in the present case have been fully performed by both parties. This appears to have been the view of the Court of Federal Claims, as indicated by the notable absence in its opinion of any reference to breach of contract. This distinction does not affect our decision, however. Regardless of whether the situation is characterized as a breach of contract, an unlawful taking, or an unlawful exaction, the arguments stem from Yankee Atomic's prior contracts with the Government.

Id. at 1573 n.2.

[388] U.S. CONST. amend. V.

and from taking private property 'without just compensation.'"[389] Once the contract was fully performed the government may not deprive a party of the benefits of those contracts.

The dissent views the Energy Policy Act as nothing more than a retroactive price increase. The dissent does not consider important that the legislation was to relieve the government from the burden of unforeseen costs. The nature of the fixed-price contract allocated the risk of unforeseen costs to the seller—in this case the United States.[390] The Fifth Amendment "was designed to bar Government from forcing some people alone to bear public burdens which ... should be borne by the public as a whole." [391]

Based on this reasoning, the dissent does not believe that either the sovereign acts or unmistakability doctrines should be applied. The sovereign acts doctrine is a defense to a government breach of contract. Since this is not a breach case, "[t]he doctrine is wholly inapplicable." Likewise, the unmistakability is a canon on construction because Yankee Atomic is not seeking enforcement of a contractual obligation. Instead, they are seeking to prevent an unlawful exaction of Yankee Atomic's money. Based on this reasoning, the dissent would find for Yankee Atomic based on an illegal taking theory.[392]

Winstar Meets CERCLA—Defense Contractors Seek to Share the Burden

Applying Winstar Criteria

The *Yankee* court was fortunate in that its analysis did not depend on which *Winstar* version of the sovereign acts and unmistakability doctrines were applied. The court was able to reach the same

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[389] 112 F.3d at 1582 (*citing Lynch,* 292 U.S. at 579)(Mayer, C.J. dissenting).

[390] *Id.*

[391] *Id.* at 1583 (*quoting* Armstrong v. United States, 364 U.S. 40, 49(1960)).

[392] *Id.* at 1583-84.

ends with alternate applications of the facts to the law. Applying the *Winstar* decision to the contracts illustrated in Section I of this thesis forces one to wade through the thicket. Each version of the doctrines leads down a different path—in the end, at least in this application, the paths seem to converge.

Is There a Breach of Contract?

Unlike the situation in *Winstar,* the World War II and Vietnam era agreements are classic agreements entered into by the government-as-contractor. The World War II era contracts were cost-plus-fixed-fee supply contracts for the production and modification of contracts. The Vietnam era contracts discussed in *Hercules* and *Vertac* were fixed-price supply contracts for the sale of the herbicide, Agent Orange.[393] Neither the World War II nor Vietnam Era contracts contained any language explicitly allocating the cost of environmental cleanup. None contained explicit language whereby the government promised not to change the law with respect to environmental regulation.

Given the age of these contracts, one could assume the contracts have been fully completed by both parties. However, the World War II contracts contained provisions whereby claims unknown to the contractor survived the final settlement.[394] This would presumably include the explicit indemnification provisions contained in the contracts. The Vietnam era contractors would argue that the implied indemnification agreements likewise survived the contract.

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[393] *Hercules,* 516 U.S. at 419 (the government "entered into a series of fixed-price production contracts"). The *Vertac* opinion does not specify the nature of the contracts for the purchase of Agent Orange. However, both *Hercules* and *Vertac* specify that the contractor bid for the contract from the government indicating use of sealed bidding which was the preferred technique used in government contracting. JOHN CIBINIC, JR. & RALPH C. NASH, JR., FORMATION OF GOVERNMENT CONTRACTS 505 (3d ed. 1998). Sealed bidding requires the use of fixed-price contracts. FAR 14.104.

[394] *See supra* note 47 and accompanying text.

The *Winstar* court started with the presumption that not only was there a contract, but also a breach of contract. Moreover, the *Winstar* breach occurred during the period of contract performance. In assessing a breach, it is well established that the latest point at which a breach can occur is when the contract is complete.[395] CERCLA, being passed in 1980, occurred many years after the performance was completed in the defense contracts discussed in Section I. However, after *Yankee,* the finality of the contract does not appear to affect the application of the sovereign acts and unmistakability doctrines.

Sovereign Acts

Applying the *Winstar* plurality's sovereign acts doctrine requires two steps. The first step is an analysis of whether the act is attributable to the government-as-contractor. If it is not, the second step is to apply ordinary rules applicable to private contracts—specifically the impossibility defense.[396]

Attributable to Government-as-Contractor?

The first step in assessing whether the sovereign act should be attributed to the government in its role as contractor is an examination of the statute. This requires an analysis of the degree of "self-interest" in the legislation. The "public and general" language provides criteria for determining the amount of governmental self-interest. CERCLA, more so than the Energy Policy Act or FIRREA, was passed to address national concerns.[397] The statute has no provisions that can be construed as targeting contracting partners of the United States. In fact, under broad waivers of sovereign

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[395] *See, e.g.,* Mulholland v. United States, 361 F.2d 237, 239-40 (Ct.Cl. 1966) (at the latest, a breach of contract claim accrues when the contract is completed); Henke v. United States, 60 F.3d 795, 799-800 (Fed.Cir.1995).

[396] *See supra* notes 280-297 and accompanying text.

immunity, the United States and all private parties are essentially treated the same. Impact on federal contracting obligations can properly be considered "incidental to the accomplishment of a broader governmental objective."[398] In spite of enormous costs to its contracting partners, it is difficult to make a straight-faced argument that CERCLA was passed in order to relieve the government of its contractual burdens.[399] The *Yankee* court would end the analysis here; however, the *Winstar* plurality would then apply the private contract law of impossibility to determine whether the government should be relieved of its obligation to perform.

Impossibility Defense

The *Yankee* court's failure to address this prong may be in part be because they recognized this classic defense to a breach of contract is conceptually difficult to apply to a completed contract. Nonetheless, application of the defense may be useful in assessing whether or not the government's action should be excused regardless of the action being labeled a taking or labeled a breach. In order to assert the impossibility defense, the *Winstar* plurality required the government to show that the nonoccurrence of the sovereign act was a basic assumption of the contract. In addition, the government would have to show the contract did not allocate the risk of the change.

The *Winstar* plurality found that in the context of a regulatory agreement, the parties undoubtedly contemplated the possibility of a regulatory change. For the government this was fatal to the impossibility defense in *Winstar.* In the context of the defense contracts at issue here, it is a safe

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[397] For a discussion of the legislative history leading up to the passage of CERCLA, see *supra* notes 97-102 and accompanying text.

[398] *Winstar,* 518 U.S. at 898.

[399] The Senate report accompanying the legislation makes no mention of a desire to eliminate the government's contractual obligations. *See* S. REP. 96-848, *supra* note 93.

assumption that neither party anticipated that Congress would pass CERCLA in response to widespread toxic contamination.

The government must clear a second hurdle—proving no allocation of the risk. The *Yankee* court points out that the nature of the contract itself may suggest a risk allocation. *Yankee* is the fairly atypical situation in which the government is the seller. In the contracts involving recovery of CERCLA cleanup costs, the government acted as the buyer. Nonetheless, the rules are clear regardless of the government's role as buyer or seller. A fixed-price contract places the risk of unanticipated costs on the seller.[400] In contrast, cost-reimbursement contracts remove the risk of unanticipated costs from the seller.[401] "[U]nder a cost-reimbursement contract, the contractor's profit is not affected by the cost of performance because incurred costs will be reimbursed and the amount of the fee is predetermined."[402]

The distinction between the cost-reimbursement and fixed-price contracts distinguishes the World War II contracts from the Vietnam era Agent Orange contracts. The government assumed the risk of unanticipated costs in the earlier contracts but not the latter. Using this rationale, one can argue that the impossibility defense is not available to the government where they have assumed the risk of unanticipated costs through the use of cost-reimbursement type contracts. Presumably, the World War II contractors would prevail, at least through this stage of the analysis.

There is no clear indication from *Winstar* about whether the unmistakability doctrine should be applied independently of the sovereign acts doctrine. The *Yankee* court, however, indicates the

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[400] *ITT Arctic Servs., Inc.*, 524 F.2d at 691.

[401] CIBINIC & NASH, *supra* note 393 at 1061.

[402] *Id.*

doctrine should only be applied if the sovereign acts doctrine indicates the act is "public and general." But then again, the *Yankee* court did not apply the impossibility defense.

Unmistakability

1. Does the Doctrine Apply?

The *Winstar* plurality, in a portion of the decision opposed by a majority of the justices, applies a threshold test to determine whether or not to apply the unmistakability doctrine. The threshold test is that if a contract can reasonably be construed as containing a risk-shifting component, and if that component can be enforced without barring the exercise of sovereign power, then there is no reason to apply the unmistakability doctrine.[403] The *Yankee* court, consistent with the *Winstar* majority, applies the unmistakability doctrine whenever the issue of liability turns on a sovereign act by the government.

a. Risk Shifting Agreement

As discussed above, the defense contracts discussed in Section I can easily be characterized as risk allocations. If a court were to apply the plurality's threshold test, the unmistakability doctrine would not be applicable to the World War II cost-reimbursement contracts, since the government is allocated the risk of unanticipated costs. However, the Vietnam era fixed-price contracts allocate risk to the contractor, and therefore the unmistakability doctrine would apply. However, before dropping the requirement that the contract contain an unmistakable promise, the plurality would first examine the contracts to see if enforcement would block exercise of the sovereign power.

b. Would Enforcement be an Affront to Sovereignty?

Damages sought to enforce the defense contracts at issue would not be an affront to the government's sovereignty. While "[t]he Government cannot make a binding contract that it will not

exercise a sovereign power... it can agree in a contract that if it does so, it will pay the other contracting party the amount by which its costs are increased by the Government's sovereign act."[404] According to the *Winstar* plurality, the only type of enforcement that would block the exercise of sovereign power would be an injunction, or damages that amount to a tax rebate. Typically, the plurality would not find enforcement of "humdrum supply contracts" subject to the unmistakability doctrine.[405] The vitality of CERCLA would not be harmed by enforcement of these contracts. As a goal, CERCLA seeks to spread the cost of environmental cleanup to those who benefited from the destruction of the environment.[406] CERCLA shifts the cost to governmental and private entities alike. There doesn't appear to be any CERCLA policy that would be thwarted by enforcement of the contracts.

2. Applying the Doctrine

While the *Winstar* plurality never discusses application of the unmistakability doctrine, both the concurring opinion of Justice Scalia and the dissent discuss application of the doctrine. Justice Scalia treats the unmistakability doctrine as a rule of presumed intent. This reverse presumption is that the government did not promise that none of its sovereign acts will incidentally prevent contract performance by itself or the other party to the contract. When the subject matter of the contract is to maintain the current state of the law, Justice Scalia would not require a second promise to keep the first promise. In the context of a regulatory agreement, Justice Scalia was willing to find an

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[403] 518 U.S. at 880.

[404] Amino Bros. Co. v. United States, 372 F.2d 485, 491(Ct.Cl. 1967).

[405] 518 U.S. at 880.

[406] *See supra* note 101 and accompanying text.

unmistakable promise was implicit in the nature of the contract.[407] Chief Justice Rehnquist, in his dissent, takes a more literal view. The dissent asserts that "a waiver of sovereign authority will not be implied, but instead must be surrendered in unmistakable terms."[408] The Federal Circuit in *Yankee* never spells out exactly what standard they are applying.

However, the *Yankee* court does provide some very specific guidance that is useful in analyzing the defense contracts involving CERCLA cleanup costs. First, the Federal Circuit will not imply an unmistakable promise from a fixed-price contract that allocates risk to the government.[409] Second, they will not imply an unmistakable promise from general legislation.[410] Therefore, it is probable that they will not find a waiver of sovereign authority in unmistakable terms based on the cost-reimbursement nature of the World War II production contracts. With certainty, they would not find a waiver in the Vietnam fixed-price Agent Orange contracts given that they already allocate the risk to the contractor. The defense contractors in both situations can counter that in addition to the nature of the contract, the contracts also contain either actual or implied indemnity provisions.

a. Indemnity Agreements

The World War II defense contracts all contained very specific indemnification clauses incorporated into the termination settlement agreements. While the language of the three vary slightly, the Tucson agreement is illustrative of all three. It provides in part that "[t]he Government shall assume and become liable for all obligations, commitments and claims that the Contractor may have theretofore in good faith undertaken or incurred in connection with said work and in accordance

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[407] 518 U.S. at 919-22 (Scalia, J., concurring).

[408] 518 U.S. at 926 (Rehnquist, C.J., dissenting).

[409] 112 F.3d at 1580.

[410] *Id.*

with the provisions of this contract...."[411] In addition, it provides that some claims will survive final settlement. The settlement agreement provides that all claims will:

> cease forthwith and forever; ...except that all rights and obligations of the respective parties in respect of costs, expenses and liabilities which may thereafter be imposed on, or incurred by, the Contractor, without its fault or neglect, which are then undetermined or incapable of determination as to either existence, validity, or amount, shall remain in full force and effect.[412]

These indemnification clauses appear on the face to be a very precise allocation of the risk of further unanticipated costs under the contract and should qualify as a waiver of sovereign authority in unmistakable terms. The costs associated with CERCLA legislation certainly qualify as costs or liabilities imposed on the contractor.[413] While litigation over the meaning of the provisions of the indemnity clause is likely, on the face they appear to be a promise in "unmistakable terms."

The *Yankee* court comments in the context of that case that the contract did not expressly state "that Yankee Atomic will be immune from any future assessments made by the Government upon the industry as a whole."[414] The Federal Circuit does not explicitly state that they would require the "unmistakable terms" of a waiver to be so detailed. Additionally, there is no case law suggesting such an impossible standard. Such a requirement would preclude parties from allocating the risk of events they could not specifically anticipate. Certainly, such an interpretation would be a dispositive obstacle in the CERCLA cleanup cases. Virtually no one during the 1940s anticipated the consequences of waste disposal on the environment—or the need for legislative remedies such as CERCLA.

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[411] Consolidated Contract, *supra* note 47.

[412] *Id.*

[413] The definition of "impose" is "[t]o levy or exact as by authority; to lay as a burden tax, duty or charge." BLACKS'S LAW DICTIONARY 518 (6th ed. 1990).

b. Implied Indemnity Agreements

The Vietnam era Agent Orange contracts do not contain similar express indemnity clauses. Instead, the contractors find implied indemnification agreements based on the nature of the contract and the Defense Production Act.[415] The Supreme Court, as discussed in Section I, was unwilling to read an implied indemnification agreement into the contract.[416] In addition, the *Yankee* court is unwilling to find a waiver of sovereign authority in unmistakable terms based on general legislation. Therefore, the prognosis for a contractual recovery is dim.

In sum, after wading through the sovereign acts and unmistakability doctrines as twisted and convoluted by the Supreme Court and Federal Circuit, the results are fairly predictable. First, it is indisputable that CERCLA is a "public and general" and qualifies as a sovereign act. There is no evidence to support an argument that Congress passed the legislation intending to benefit the government-as-contractor. Applying the plurality's second step—the impossibility defense—yields the same results as application of the unmistakability doctrine. The application of any of the articulated tests is heavily influenced by the degree of risk allocation present in the contract. The World War II contractors have strong arguments based on both the risk allocations inherent in the cost-reimbursement contract and the express indemnification clauses provided within the contract. The fixed-price contracts entered into by the Agent Orange contractors are another story. The nature of the contract allocates the risk to the seller and the evidence to support even an implied indemnification clause is weak. Therefore under any analysis, the World War II contractors should

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[414] 112 F.3d at 1579.

[415] *Hercules,* 516 U.S. at 429-30.

[416] *See supra* notes 57-83 and accompanying text.

prevail—at least to this point. Fixed-price supply contracts without indemnification provisions—i.e. the Agent Orange type contracts—present a far weaker case.

Further Obstacles

In both *Winstar* and *Yankee* the courts were able to complete their analysis after discussion of the unmistakability and sovereign acts doctrine. Neither of those cases involved additional issues typical of "humdrum supply contracts."[417] Even if a defense contractor prevails through this state of the analysis, they will encounter several more legal hurdles before recovering under a contract theory. These issues, although each could warrant a complete thesis, will only be briefly discussed.

Jurisdictional Issues—Tucson Airport Authority v. General Dynamics

Contractors seeking reimbursement of CERCLA cleanup costs must select the appropriate forum for the suit. In 1996, General Dynamics sought to enforce the Consolidated Contract discussed in Section I in the federal district court of the District of Arizona.[418] They filed suit under the Administrative Procedures Act (APA).[419] The contractor specifically sought specific enforcement of contractual provisions calling for the United States to assume the contractor's defense in the CERCLA actions. The District Court granted summary to the United States, finding the court lacked jurisdiction. On appeal, the Ninth Circuit discussed the limitations of federal district court jurisdiction.[420]

The court begins by noting that in a suit against the United States the starting assumption is that no relief is available unless it is specifically provided. "[T]hat a plaintiff against the United States

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[417] 518 U.S. at 880.

[418] *Tucson Airport Authority,* 922 F.Supp. 273.

[419] Administrative Procedures Act, 5 U.S.C. § 701, *et. seq.*

[420] *Tucson Airport Authority,* 136 F.3d 641.

may receive less than complete relief in the federal courts should not necessarily be viewed as an inappropriate result, for such a plaintiff is accorded, by statute, more relief than historical principles of sovereign immunity would allow."[421] The APA provides for jurisdiction in federal district court if three conditions are met: "(1) its claims are not for money damages, (2) an adequate remedy for its claims is not available elsewhere and (3) its claims do not seek relief expressly or impliedly forbidden by another statute."[422] The Ninth Circuit determined that only the third prong prevented the relief General Dynamics sought.

By seeking specific performance of the contract, General Dynamics satisfied the first two prongs of the test.[423] Even if the remedy requires a payment of money, the court found a suit for specific performance is not equivalent to an action for "money damages."[424] Likewise, because the Court of Federal Claims is not authorized to grant equitable relief, there is no adequate remedy available elsewhere. The Ninth Circuit pointed to a Supreme Court decision holding: "We are not willing to assume, categorically, that a naked money judgment against the United States will always be an adequate substitute for prospective relief."[425]

The third prong is problematic for General Dynamics because the Tucker Act forbids such relief. The Tucker Act provides that: "The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded ... upon any express

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[421] *Id.* at 644.

[422] *Id.* at 645.

[423] *See* Seamon, *supra* note 226 for an article discussing limitations of seeking specific performance from the government.

[424] *Id.*

[425] Bowen v. Massachusetts, 487 U.S. 879, 905 (1988).

or implied contract with the United States...."[426] While the district courts have concurrent jurisdiction for claims under $10,000, for other claims the Court of Federal Claims has exclusive jurisdiction. If the claims are contractually based, the district court has no jurisdiction. Since General Dynamics is seeking to have the district court determine what its rights under the contract are, the claim is contractually based. Therefore, defense contractors will be required to bring suit in the Court of Federal Claims with the limitation that they will be limited to a monetary remedy.[427]

Anti-Deficiency Act

More than one commentator suggests that the Anti-Deficiency Act presents a major obstacle to the claims of defense contractors for CERCLA cleanup costs under a contract theory.[428] The Anti-Deficiency Act flows from the Appropriations Clause of the United States Constitution that places control of the purse strings within the Congress. The Clause states: "no Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." [429] The Act provides:

> (a)(1) An officer or employee of the United States Government or of the District of Columbia government may not--
>
> (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;
>
> (B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.[430]

However, the courts have long held that neither the Anti-Deficiency Act nor the Appropriations Clause is a defense to a breach of contract claim against the government.[431]

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[426] Tucker Act, 28 U.S.C. § 1491(a)(1).

[427] 136 F.3d at 646-47.

[428] *See, e.g.,* Bunn, *supra* note 11, at 218-27; Kannan, *supra* note 92, at 31.

[429] U.S. CONST. art. I, § 9, cl.7.

"[N]either the Appropriations Clause of the Constitution, nor the Anti-deficiency Act, shield the government from liability where the government has lawfully entered into a contract with another party."[432]

The ADA, therefore, does not provide an independent defense for the government for the breach of a contract *lawfully* entered into with another party. On the other hand, a contract that has been entered into in violation of a statute however is *void ab initio* and the government may avoid the contract.[433] This includes contracts entered into "in the face of express congressional prohibition."[434] The Supreme Court noted in *Hercules* that "the accounting officers of the Government have never issued a decision sanctioning the incurring of an obligation for an open-ended indemnity in the absence of statutory authority to the contrary."[435]

As far as the World War II contracts are concerned the Contracts Settlement Act of 1944 provided that authority. The Act provides in part:

> Each contracting agency shall have authority, notwithstanding any provisions of law other than contained in this Act... in settling any termination claim, to agree to assume, or indemnify the war contractor against, any claims by any person in connection with such termination claims or settlement. This subsection shall not limit or affect in any way

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[430] Anti-Deficiency Act, 31 U.S.C. § 1341.

[431] Ferris v. United States, 27 Ct. Cl. 542, 546 (1892)("exhaustion of appropriation justifies stopping a contractor's work, but does not constitute a defense to a breach of contract claim"); Parsons v. United States, 15 Ct. Cl. 246, 247 (1879).

[432] Wetsel-Oviatt Lumber Co. v. United States, 38 Fed. Cl. 563, 570 (1997).

[433] *See generally* CIBINIC & NASH, *supra* note 401, at 74-77.

[434] American Tel. & Tel. Co. v. United States, 124 F.3d 1471, 1494-95 (Fed. Cir. 1997).

[435] *Hercules,* 516 U.S. at 428 n.10 (*quoting* In re Assumption by Government of Contractor Liability to Third Persons—Reconsideration, 62 Comp. Gen. 361, 364-365 (1983)).

> any authority of any contracting agency under the First War Powers Act, 1941, or under any other statute.[436]

Therefore, the contracts did not violate the Anti-Deficiency Act at formation, because of statutory authority to include broad indemnification provisions. The Anti-Deficiency Act was neither a bar making them *void ab initio* nor a defense to a subsequent breach of those contracts.

Arising Out of Contract

Contractors seeking enforcement of an indemnification provision would have the additional burden of showing the CERCLA cleanup costs are sufficiently related to the contract. Each of the contracts discussed in Section I are worded slightly differently—but each suggest the indemnification clause is limited to liability arising from the contract performance.[437] Commentators have suggested that costs incurred so many years after contract performance are simply too attenuated.[438] The counter argument is that the contamination occurred at the time of contract performance and flowed directly from contract performance.

Finality vs. The Takings Clause

Full and Final Settlement

A final legal impediment to defense contractor recovery is the concept of "finality." The contracts at issue are in many cases more than 50 years old. As the dissent in *Yankee* observed, the latest a breach of contract claim can accrue is when a contract is complete.[439] Today, a contract is

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[436] 41 U.S.C. § 120.

[437] *See, e.g.,* Consolidated Contract, *supra* note 47; DuPont Contract, *supra* note 26; and Ford Contract, *supra* note 38 and accompanying text for the language of the indemnification clauses.

[438] *See* Bunn *supra* note 11, at 227-30 for an in-depth analysis of whether the costs are allowable and a comparison to cases of third-party liability arising from asbestos claims.

[439] 112 F.3d at 1582.

completed when the government issues final payment.[440] Before making final payment, the government often requires a release of claims and liabilities. Provisions of the FAR clauses often bar claims not asserted before final payment.[441] There are limited circumstances where a contractor can avoid a release and still assert a claim after "final payment."[442]

However, the World War II contracts discussed in Section I, are subject to Settlement Agreements entered into pursuant to the Contract Settlement Act of 1944. The stated purpose of the Act was in part "to assure to prime contractors and subcontractors, small and large, speedy and equitable final settlement of claims under terminated war contracts."[443] The Act defines "the term 'final and conclusive,' as applied to any settlement, finding, or decision means that such settlement, finding or decision shall not be reopened, annulled, modified, set aside, or disregarded ... in any suit, action, or proceeding except as provided by this chapter."[444] In addition, the Act spells outs exceptions to finality:

> where any such settlement is made by agreement, the settlement shall be final and conclusive, except (1) to the extent otherwise agreed in the settlement; (2) for fraud; (3) upon renegotiation to eliminate excessive profit under section 1191 of Appendix to Title 50, unless exempt or

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[440] *See* CIBINIC & NASH, *supra* note 142, at 1209-38.

[441] *See, e.g.,* Changes Clause, FAR 52.243-1; Suspension of Work, FAR 52.212-12; Government Delay of Work, FAR 52.212-15.

[442] Contractors have successfully asserted several theories to avoid a general release, including: a) lack of consideration for a supplemental agreement; b) mutual mistake by the parties concerning the release; c) economic duress and use of unfair tactics by government in getting contractor to sign release; d) fraud; and e) lack of authority by government official. *See* CIBINIC & NASH, *supra* note 142, at 1231-38.

[443] Contract Settlement Act of 1944, 41 U.S.C. §101(b).

[444] 41 U.S.C. §103(m).

> exempted under such section; or (4) by mutual agreement before or after payment. ...[445]

In a case interpreting the Act, the Court of Appeals for the Federal Circuit held: "It is clear that Congress did not intend, unless there was a plain or explicit exception, to leave contracts open and unsettled for decades. Rather, Congress wanted to end with finality war-time contracts and move swiftly into a peace-time economy."[446]

The contracts at issue appear to contain language containing explicit exceptions exempting certain contractor claims from finality. Each of the Settlement Agreements contain different but similarly broad language exempting currently unknown claims arising from the final settlement. The DuPont Contract exempts: "[c]laims by the Contractor against the Government, which are based upon the responsibility of the Contractor to third parties and which involve costs reimbursable under the Contract, but which are not now known to the Contractor."[447] The Consolidated Contract exempts: "costs, expenses and liabilities which may thereafter be imposed on, or incurred by, the Contractor, without its fault or neglect, which are then undetermined or incapable of determination as to either existence, validity, or amount, shall remain in full force and effect...".[448] Finally, the Ford Settlement Agreement apparently contained language exempting unknown third party claims arising from the contract.[449] The courts will have to wrestle with whether these are "plain and explicit" exceptions that justify leaving these extremely old contracts open. However, a finding that the contracts have been fully performed and finally settled may not sound the death knell to a contractor's suit.

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[445] 41 U.S.C. §106(c).

[446] American Employers Ins. Co. v. United States, 812 F.2d 700 (1987).

[447] DuPont Contract, *supra* note 26.

[448] Consolidated Contract, *supra* note 47.

The Takings Clause

After *Yankee*, the finality of a contract apparently has no impact on the court's analysis of a contractor's claim when applying the sovereign acts and unmistakability doctrines. The majority states the reasoning is the same: "[r]egardless of whether the situation is characterized as a breach of contract, an unlawful taking, or an unlawful exaction, the arguments stem from Yankee Atomic's prior contracts with the Government."[450] The dissent, disagreed stating the unmistakability and sovereign acts doctrines are not applicable to unlawful taking cases.[451]

The Takings Clause of the Fifth Amendment states: "Nor shall private property be taken for public use, without just compensation."[452] Although takings cases typically involve the government confiscating private property for public use, the clause has been found to prevent government interference with other property interests, including contractual rights. "Rights against the United States arising out of a contract with it are protected by the Fifth Amendment" of the United States Constitution.[453] "Congress [is] without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure would be not the practice of economy, but an act of repudiation."[454] The purpose of the Takings Clause of the Fifth Amendment is to prevent the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a

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[449] *See* Bunn, *supra* note 11, at 231-32.

[450] 112 F.3d at 1573 n2.

[451] *Id.* at 1583 (dissent).

[452] U.S. CONST. amend. V.

[453] *Lynch,* 292 U.S. at 579.

[454] Perry v. United States, 294 U.S. 330, 352-53 (1935).

whole."[455] Further, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[456]

Historically, claims of an unlawful taking based on CERCLA have not been successful. While the Supreme Court has never addressed the issue, many district and circuit courts have. In one of the most often cited cases, *NEPACCO*, the Eighth Circuit rejected a taking claim because the government mandated cleanup did not deprive the plaintiff of a "property interest" protected under the Fifth Amendment.[457] Many of the other claims have involved situations where the government mandated cleanup required physical occupation of the plaintiff's property.[458] In the few cases where the plaintiff prevailed, they were able to establish the physical occupation was permanent.[459] Very few cases have involved claims of an unlawful taking based on a contractual relationship with the government.

In *Eastern Enterprises v. Apfel,* the United States Supreme Court addressed the applicability of the Takings Clause to the Coal Act.[460] The Coal Act was passed in 1992 to address the failing pension programs initially established in 1950 and 1974. In an attempt to stabilize the pensions, Congress assessed corporations who had employed miners in the past. Eastern Enterprises, who had been out of the coal business since 1965, was assessed and filed suit claiming this was an unlawful

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[455] Armstrong v. United States, 364 U.S. 40, 49 (1960).

[456] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

[457] United States v. Northeastern Pharmaceutical & Chemical Co., Inc., 810 F.2d 726 (8th Cir. 1986).

[458] *See, e.g.,* Juliano v. Montgomery-Otsego-Schoharie Solid Waste Management Auth., 983 F. Supp. 319 (No. Dist. N.Y. 1997).

[459] *See* Hendler v. United States, 952 F.2d 1364 (Fed. Cir. 1992).

[460] Eastern Enterprises v. Apfel, 524 U.S. 498 (1998); Coal Industry Retiree Health Benefit Act of 1992 (Coal Act), 26 U.S.C. §§ 9701-9722 (1994 ed. and Supp. II).

taking.[461] The Supreme Court agreed. In reaching their decision the Court held: the "inquiry, by its nature, does not lend itself to any set formula, and the determination whether "'justice and fairness' require that economic injuries caused by public action [must] be compensated by the government, rather than remain disproportionately concentrated on a few persons," is essentially ad hoc and fact intensive."[462] However, the Court enunciated at least three factors they consider important: "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action."[463]

Hercules, Inc., in continuing litigation arising from the cleanup of the Jacksonville, Arkansas site discussed in Section I, argued CERCLA involved an unconstitutional taking in light of the Supreme Court's decision in *Eastern.*[464] The district court summarily dismissed the claim finding the retroactive application of CERCLA was constitutional in light of *NEPACCO.*[465] The court did not discuss the effect of CERCLA on the Agent Orange contracts as a taking of a vested property right.

In the 1993, prior to the *Eastern* decision, the district court rejected Shell Oil's unlawful taking claim. In finding Shell liable for the cleanup of the McCroll superfund site, the district court found CERCLA does not involve taking issues at all. "In view of the statutorily provided right of contribution, CERCLA's provision for allocating liability for the cleanup of public hazards cannot fairly be characterized as a taking at all." The court reasoned this was because: "CERCLA, as

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[461] 524 U.S. at 504-18.

[462] *Id.* at 522.

[463] *Id*; One district court, in an unpublished opinion, applied the test set out in *Eastern* to CERCLA. The court rejected the notion that CERCLA liability amounted to a taking—however, the case did not deal with a vested contract as a property right. *See* United States v. Asarco, Inc., Case No. CV 96-0122-N-EJL, *available in* 1999 U.S. Dist. LEXIS 18924 (Dist. Idaho 1999).

[464] United States v. Vertac Chemical Corp., 33 F. Supp. 2d 769, 784-85 (E.D. Ark. 1998).

amended by SARA, clearly provides a mechanism by which parties held liable for response costs under § 107(a) may allocate those costs among themselves through contribution suits under § 113(f)...."[466]

To date, no court has squarely addressed whether retroactive application of CERCLA is an unlawful taking of a vested property right in completed contracts. Certainly, the right of contribution under CERCLA is limited to other PRPs. As discussed in Section II, a contracting partner is not ordinarily considered a PRP—absent some fairly extraordinary circumstances. Without a right to contribution, the *Shell* court may have reached a different conclusion. After all it was that same court who in a subsequent decision remarked: "[t]he American public stood to benefit from the successful prosecution of the war effort, so too must the American public bear the burden of a cost directly and inescapably created by the war effort."[467]

Section Summary

Defense contractors seeking to recover CERCLA cleanup costs under contractual theories are entering an area of the law fraught with uncertainty. *Winstar* does provide precedent for claims against the government when changes in the law adversely affect its contractual relationship. *Yankee* extends the analysis to completed contracts and to non-regulatory agreements with the government. The primary obstacle will be CERCLA's characterization as a "public and general" sovereign act. However, that does not end the analysis. Defense contractors have a colorable claim when the contractual relationship allocates the risk of change to the government.

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[465] *Id.*

[466] *Shell Oil Co.,* 841 F.Supp. at 974.

[467] *Shell Oil Co.,* 13 F.Supp.2d at 1027.

CONCLUSION

Today, as a matter of law and policy, government contracts are required to incorporate provisions designed to protect the environment. In addition, parties to government contracts are subject to a veritable plethora of environmental regulations and oversight by the Environmental Protection Agency. However, the country is still faced with the cost of years of environmental neglect and the challenge of paying the bill. The environmental costs of defense contracts alone are substantial. This thesis has reviewed the challenge of spreading the cost among those responsible for the widespread contamination resulting from defense contracts.

Section I began by outlining some of the provisions in current contracting procedures to avoid environmental problems and to allocate the costs of environmental cleanup. As a contrast, a number of defense contracts from the Vietnam and World War II eras were discussed. None of those contracts contained explicit provisions to deal with environmental consequences. As a result, several of those contracts have resulted in litigation. Litigation over two of the World War II contracts is pending currently in the United States Court of Federal Claims.

Section II examined in some detail the liability of defense contractors under CERCLA. The various attempts by contractors to assert government liability as a contracting partner was discussed. Because a contractual relationship is not enough to establish a party as a PRP, defense contractors have had to struggle to show the United States was either an "owner," "operator," or "arranger." The key factor has been to establish that the government exercised a substantial degree of control. However, after *Bestfoods,* many of the factors used by the court in *FMC* do not appear to be applicable. The ability of defense contractors to establish the government as a PRP, based on a contractual relationship, in the future looks unlikely.

Section III turned to another avenue by which defense contractors have attempted to recover the costs of environmental cleanup. *United States v. Winstar* was analyzed in detail as a case where

the Supreme Court found the government liable for a breach of contract following a Congressional change in the law. The unmistakability and sovereign acts doctrines were examined as ways to determine the allocation of risk when the law changes and frustrates contractual expectations. *Yankee* examined application of the difficult *Winstar* principles to the effect of a change in the law on a completed contract. The defense contracts, discussed in Section I, were then analyzed in light of the court's teachings. The thesis concludes that the nature of the contract and the specific provisions allocating the risk of change should be paramount in assessing the claims. As a result, claims under the World War II contracts appear to have merit. In contrast, the Vietnam era fixed-price contracts appear to allocate the risk to the contractor. Section III concluded by briefly examining other obstacles as well as alternate theories of liability under the Takings Clause.

In the final analysis the question is reduced to who should bear the cost of defense contracts that benefited both the public at large and the individual defense contractors. The district court in *Shell Oil* believed that "the American public stood to benefit from the successful prosecution of the war effort, so too must the American public bear the burden of a cost directly and inescapably created by the war effort." However, the entire purpose of entering written contracts is to assign risk. When a contract fails to clearly assign risk, allocating responsibility and cost entails a tortured journey through a judicial maze. The result, after *Winstar* is uncertainty.